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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. 22-1149

IN THE SUPREME COURT OF TEXAS

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

v.

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

RESPONDENTS' BRIEF ON THE MERITS

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ISSUES PRESENTED

Respondents submit that the issues presented, as reformulated and expanded by the Petitioners in their merits briefs, inaccurately capture the questions that can be presented to this Court. More accurately stated, the issues that would be presented in this appeal are as follows:

1. Did the Court of Appeals err in affirming the trial verdict rejecting Petitioners' Gift Clause challenge, based on findings of fact that Petitioners did not challenge on appeal, including that the City retains sufficient controls over its employees using Association Business Leave to ensure accomplishment of a predominantly public purpose?

2. Did the Court of Appeals err in affirming the trial court's ruling on Respondent AFA's motion under the then-applicable, pre-2019 Texas Citizens' Protection Act?

   (Respondents City of Austin and the City Manager take no position in the brief with regard to Issue 2, for the reasons set out in footnote 10.)

STATEMENT OF FACTS

The court of appeals correctly stated the nature of the case in its underlying opinion, *Borgelt v. Austin Firefighters Ass'n, IAFF Loc. 975*, No. 03-21-00227-CV, 2022 WL 17096786 (Tex. App. Nov. 22, 2022) ("Op."). This appeal arises from Petitioners'[1] constitutional challenge to Article 10 of the 2017-2022 Collective Bargaining Agreement ("Agreement" or "CBA") between the City of Austin and its fire fighters, represented in bargaining by the Austin Firefighters Association ("AFA" or "Association"). Petitioners have asserted that Article 10 of the otherwise valid Agreement is an unconstitutional gift of public funds because it provides for a pool of "Association Business Leave" ("ABL") to be used by the City's fire fighters, which supposedly inures only to the benefit of Respondent AFA. As the trial and appellate courts correctly concluded, however, Petitioners have failed to demonstrate that the bargained-for terms of the Agreement are a gift of public funds for private purposes.

On appeal, Petitioners failed to challenge "any of the trial court's findings of fact or the sufficiency of the evidence supporting those findings," challenging only

[1] Petitioner the State of Texas is referred to herein as "Intervenor-Petitioner," and Petitioners Borgelt, Pulliam, and Wiley, are referred to as "Taxpayer-Petitioners." Collectively, Intervenor-Petitioner and Taxpayer-Petitioners are referred to as "Petitioners."

the trial court's legal conclusions. Op. at *3; *see also* Pet. Tex. Br. at 20 (reciting standard of review when findings of fact unchallenged).[2]

a. The Agreement, Including the ABL Provision, Constitutes an Exchange of Bargained-for Consideration

As the court of appeals observed, Petitioners "[did] not challenge the trial court's findings of fact (FOF) number twelve, 'The [Agreement] constitutes a bargained-for exchange of valid consideration on all sides.'" Op. at *5 n.4. Indeed, "[b]oth the Agreement's express terms and the record evidence support a conclusion that the [ABL] Provision is supported by sufficient consideration." Op. at *7.

Specifically, the CBA at issue was ratified, after arms-length negotiations between the City's and the Association's negotiation teams, on September 28, 2017, and was binding on the City, the City's fire fighter employees, and their employee association. CR.4127 (Am. Joint Stipulated Facts) at ¶¶9-13; 7.RR.5-109 (CBA); 3.SCR.55-56 (Resolution); 3.SCR.466-68 (Nicks Aff.); 3.SCR.373 (Nicks); 3.SCR.290-91 (Paulsen); 3.SCR.210-11 (Flores); 5.RR.134:19-135:1 (CBA terms "part of a long negotiation process").[3] Within the comprehensive Agreement,

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[2] The Taxpayer-Petitioners' and Intervenor-Petitioner's briefs on the merits are cited herein as "Pet. Br." and "Pet. Tex. Br.," respectively.

[3] Respondents use the following record citation forms: "[Volume Number].RR.[Page Number]" refers to the seven-volume reporter's record of July 22, 2021. "CR.[Page Number]" refers to the

Article 10 provides for a pool of ABL hours that can be used by the City's fire fighters under certain conditions set out in the Agreement. 7.RR.5-109 (Joint Ex. 1) (2017-2022 CBA); 4.RR.134:21-135:11 (Woolverton) ("not just Article 10 in that contract. There's, I believe, 30 some odd articles within that contract, and it goes from salaries, hourly wages to [ABL] . . . each one is a give and take.").

The record abounds with examples of sufficient consideration for the pool of ABL, even beyond fire protection and emergency response services AFD firefighters provide. For example, the appellate court highlighted unchallenged factual findings that, in the Agreement, the fire fighters agreed to concessions that "result in changes favorable to the City on matters otherwise governed by the civil-service provisions found in Texas Local Government Code Chapter 143." Op. at *6 & n.5. Those concessions included changes to terms favorable to the City on "hiring, promotions, disciplinary investigations, disciplinary appeals, allowing for differences in base wages based upon seniority, longevity pay, required certifications, required education, specialized assignments, the designation of personnel in certain positions with certain leave and pay levels, drug testing, and the ability to merge the Austin

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clerk's record of May 28, 2021, "SCR.[Page Number]" refers to the supplemental clerk's record of June 10, 2021, "2.SCR.[Page Number]" refers to the clerk's record of September 27, 2021, and 3.SCR.[Page Number]" refers to the clerk's record of January 19, 2022. Additional parenthetical information is added to reflect the witness or document cited, where helpful.

Fire Department with Travis County Emergency Services District." Op. at *6. The Association, moreover, agreed to "constructively support the goals and objectives of" Austin's Fire Department. *Id*.

The Agreement also binds the AFA to "several specific obligations related to a number of administrative requirements," Op. at *6, including administering the ABL bank, recordkeeping duties regarding membership rolls and dues, terms governing and communications with AFA membership and with the Civil Service Commission, reviewing fire fighters' potential grievances and making an initial determination of whether that grievance is valid, and, if so, moving valid grievances forward through the process. Op. at *6.

The appellate court further noted the uncontroverted evidence at trial that, when the City first agreed to provide its employees ABL, it did so "in exchange for a change in the treatment of sick leave from 'productive leave' that counted towards employees' hours worked for purposes of calculating overtime to 'nonproductive leave' that did not count towards employees' hours worked" for overtime purposes, with AFA's President testified saved the City "between $500,000 and $600,00 per year, while the cost of [ABL] is approximately $200,000 per year." Op. at *7.

b. Record Evidence Provided Overwhelming Support for the Conclusion that the Agreement, Including the ABL Provision, Serves a Predominantly Public Purpose and Affords a Clear Public Benefit in Return

Petitioners also failed to challenge the trial court's factual findings that the CBA as a whole provides several important public benefits. *See*, *e.g.*, Op. at *7 (identifying three unchallenged factual findings concerning public benefit received). Even viewed narrowly, the term authorizing ABL itself provides a clear public benefit, on the uncontroverted trial record. 4.RR.179:8-181:7 (Paulsen) (agreeing ABL provides direct or indirect benefit to City, including allowing participation in "oversight committees," like the weekly "cadet hiring oversight committee"; the Chief "looks at these committees as a valued contribution in that they're representing lots of different perspectives"); 5.RR.142:17-24 (Nicks) (ABL use allows Chief "to make a more informed decision a lot of times on very important issues").

Petitioners' conclusory assertion that ABL is used to serve the Association's mission "rather than the Department's mission" ignores the unchallenged factual findings that the "mission of the AFA includes furthering professional standards for firefighters, promoting fire fighter and public safety, and working towards more harmonious labor relations" and that the "missions of the AFD and AFA overlap and are not mutually exclusive." CR.4209. The trial record contained ample support for the conclusion that ABL was used by AFD employees for purposes that further the

Department's mission and provided clear benefits to the City. *See, e.g.*, 4.RR.179:13-179:20 (Paulsen) (City benefits from ABL use for "a labor management initiative where we come together once a month and talk about issues"); 4.RR.181:8-182:14 (Paulsen) (ABL use for labor-management meetings benefits City by improving communication); 4.RR.133:3-15 (Woolverton) ("if we work things out through a grievance process or dispute resolutions process, that's the way we prefer to do it").

Further, the record demonstrated that the Association's President, AFD Battalion Chief Bob Nicks, used ABL to meet with AFD management—regularly and on demand—for hours at a time, and per his uncontroverted testimony, the City has reaped millions of dollars in public benefit because of his efforts in those meetings while on ABL. *See, e.g.*, 3.SCR.314-15 (Nicks) (recently met with Chief Dodds for hours), 313 ("a lot of common, mutual projects we work on together, where we're coordinating our time and ideas, and resources to accomplish."), 315 (nearly six hours of personnel and management meetings in one day), 316-17 (when on ABL, meetings between Nicks and management resulting in $3-4 million savings to City); 4.RR.129:1-12 (Woolverton) (when on ABL, Chief Nicks regularly attended meetings with management, responsive to meeting requests, and "there would have been an issue had [Nicks] refused to meet with them"); 5.RR.140:6-

140:6 (Nicks) ("regularly having meetings" with management; when "anybody in the command" calls, "I pick up immediately, and I deal with every issue they need, provide any perspective of work they need"); *see also* 4.RR.252:5-21 (Nicks) (efforts facilitating CBA ratification).

Uncontroverted evidence also established that Chief Nicks' use of ABL enhanced AFD operations by facilitating open communication between AFD management and the Department's fire fighters. 5.RR.145:24-146:24 (Nicks) ("a lot of value" to City from relaying what "helps or hurts morale," finding "safety issue[s]" and "operational issues that need to be addressed," concluding "we bring a lot of great information forward to [the Chief] so he can base the decisions he makes are partly off of what we're bringing forward"); 5.RR.146:25-147:3 (Nicks) (agreeing work on ABL "can improve the operations of the Department"), 154:21-155:10 (significant time "communicating messages from [AFD] management to the AFA membership").[4]

[4] Uncontroverted evidence also established that Nicks spent time on ABL in direct support of critical public service, such as coordinating efforts to transport Austin residents—who had been trapped without power or water by a snow emergency—to safety. 5.RR.137:20-138:25 (Nicks) (coordinating efforts that "probably saved close to a hundred people that were freezing in their homes"); 5.RR.139:1-139:17 (Nicks) (ABL used to open "warming shelter at our Union hall, a 40-bed shelter," and emergency water deliveries which continued for a "couple-week period").

c. The City Retains Sufficient Control Over Chief Nicks While Using ABL

Petitioners stipulated, before trial, that Chief Nicks is "employed as a full-time City of Austin firefighter." 7.RR.451 (Am. Joint Stipulated Facts) at ¶18. Further, as the trial court found and Petitioners failed to challenge, Chief Nicks, like all other AFD personnel, was "required to follow the personnel policies of the City and the AFD," was "required to follow AFD's Code of Conduct at all times when using ABL," was "required to comply with continuing education requirements, EMT requirements," agreed he could "be disciplined by the City for failing to follow applicable personnel policies, AFD's Code of Conduct, or applicable continuing education and medical credentialing requirements," and "regularly attend[ed] meetings with AFD management and meets with the Fire Chief when requested to do so." CR.4211-12 (Am. FOF & COL) at ¶¶32-36; *see also* 7.RR.452 (Am. Joint Stipulated Facts) at ¶34 ("Nicks is required to follow the City's Code of Conduct."), ¶35 ("Nicks must physically report to the Fire Department for an emergency or a special project when directed to do so by supervisors, as outlined in the CBA.");

4.RR.245 (Nicks) ("I'm first and foremost an Austin firefighter, and I abide by all the rules, I know what the rules are, and I abide by them.").[5]

The trial court found and Petitioners failed to challenge that Chief Nicks "regularly attends meetings with AFD management and meets with the Fire Chief when requested to do so." CR.4211-12 (Am. FOF & COL) at ¶36. Indeed, uncontroverted record evidence established that Chief Nicks attended hours of meetings with management in a given day and attends regularly scheduled meetings with management, including his direct supervisor, the Chief of Staff, "[w]henever he asks me to." Op. at *10; 3.SCR.372, 386-88; 3.SCR.314-15 (Nicks) (could be hours of meetings at AFD in a given day); 3.SCR.235-37 (Woolverton) (Nicks has "regularly scheduled" interactions with Chief Dodds, recurring monthly meetings and others "as-needed").

As an AFD employee, Chief Nicks is subject to the same policies as other AFD employees, including the performance review system (which, during the relevant time period, was not implemented for Fire Department employees, including Chief Nicks). *See* 5.RR.113:6-8 (Nicks) ("Q. Does the Fire Chief give you

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[5] *See also, e.g.*, 4.RR.126:18-127:1 (Woolverton) (Nicks "held to the same standard as anyone" at the Department); 4.RR.243:6-244:7 (Nicks) ("if there was a circumstance where [AFA Bylaws are] in conflict I certainly would have to abide by the Code of Conduct in the City of Austin.. . . . I do not believe they're in conflict. I can't think of an instance where they are").

performance reviews? A. No, but nobody gets performance reviews in the Department right now because we don't have a process for doing that."); 5.RR.113.18-20 (Nicks) ("An official, like, sit down with a piece of paper review, they don't exist in our department, so the answer is no.").

Although Nicks is AFA's President, it is undisputed he is also an employee of the City. As the appellate court correctly observed, "[w]hile the City cannot choose who the Association's President is, the City controls his employment as an AFD employee, including retaining its ability to terminate his City employment, which would terminate his access to paid leave of any kind." Op. at *10. Indeed, as the appellate court noted, Chief Nicks can be—and has been—subjected to Department discipline for his conduct as an employee while he was on ABL. 3.SCR.466-68 (Nicks Aff.); 3.SCR.316-17 (Nicks); 3.SCR.257-58 (Woolverton). Op. at *10.

d. AFD Enforces a Detailed Pre-Approval System for its Employees' Use of ABL and Retains Sufficient Control Over Other AFA Members Who Use ABL

In addition to the limits placed on Chief Nicks, the terms of the Agreement limit other AFA members' use of ABL to time spent on collective bargaining, adjusting grievances, attending union conferences and meetings, and any other AFA "business activities that directly support the mission of the Department or the

Association, but do not otherwise violate the specific terms of this Article." 7.RR.5-109 (Joint Ex. 1) (CBA) at Art. 10(1)(B)(2).

ABL is available for use by AFD employees—whether those employees are AFA members or not, *see* 4.RR.124-26—and ABL requests by those employees are subject to a detailed approval process by AFD. A fire fighter requesting ABL must submit a request to AFD at least three days in advance; this request is reviewed by AFD management and then either approved or disapproved by the Fire Chief's designee based on compliance with the terms of the CBA and operational needs of the Department. *See* 7.RR.111-12 (Joint Ex. 3) (General Order E111.2); 7.RR.5-109 (Joint Ex. 1) (CBA) at Art. 10(1)(C)–(D). The request is submitted via an AFD request form on a system called Formsite, which includes fields for the fire fighter's name, proposed date and period of time for ABL usage, and a detailed "Purpose of Request" field that must be completed. 3.SCR.248-49; 4.RR.116:10-117:15 (Woolverton). As the uncontroverted record demonstrates, if the "Purpose of Request" field indicates that the purpose of the ABL would not meet the Department's standards, it is submitted to multiple levels of review and the request may be denied by AFD. *See, e.g.*, 4.RR.121:16-122:14 (Woolverton), 124:21-125:8 ("If a firefighter is on suspension pending an investigation, they obviously wouldn't be approved to use ABL to go to a cadet oversight committee or things like that.").

The City considers more detail when reviewing ABL requests than merely the "category" of the request. For each and every ABL request, the City not only requires a "category" like "Other Association Business" to be specified, but it also requires detailed "Purpose of Request" information to be submitted; if ever that information is not submitted to AFD, the ABL request is "kicked back asking for the submitter to put in the required information." 4.RR.116:10-117:15 (Woolverton). If the "purpose" appears inappropriate, the request is subjected to additional review and may be denied by AFD. *See, e.g.*, 4.RR.121:16-122:14 (Woolverton) (if request seems political in nature, "it's something that we would really screen," and "I would want to get the Chief of Staff's input, probably the Fire Chief's input, and probably City legal").[6]

As the trial court found and Petitioners failed to challenge on appeal, the City *can deny* and *has denied* ABL requests before, such as when the employee's use of ABL would be inconsistent with ABL's purposes under the CBA or would interfere with the operational needs of AFD. CR.4210 (Am. FOF & COL) at ¶24; *see also*

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[6] 4.RR.116:10-117:15 (authenticating Joint Exhibit 7, an electronic file containing historical "Purpose of Request" information for ABL requests); 7.RR.153-188 (printed out copy of Joint Exhibit 7, clipping off majority of "Purpose of Request" column that was visible to trial court in electronic file but not adequately preserved in appellate record, as noted in previous briefing by Respondents).

3.SCR.342 (Nicks) (ABL for Battle of the Badges event denied); 5.RR.160:12-161:11 (Nicks) (denial "where the operational needs of the Department kind of trumped the – you know, the approval of ABL"); 4.RR.113:13-114:14 (Woolverton) (denial of ABL request to attend rally); 3.SCR.265 (Woolverton) (same). Moreover, per Chief Nicks' uncontroverted testimony, he cannot recall a single time when anyone accused fire fighters of using ABL inappropriately, once it had gone through the AFD approval process. 5.RR.155:25-156:7 (Nicks).

SUMMARY OF ARGUMENT

Here, Petitioners' appeal—just like the arguments they raised unsuccessfully in the courts below and in lawsuits their attorneys brought challenging similar leave provisions in Arizona and New Jersey that were rejected by those two jurisdictions' high courts[7]—relies on erroneous recitations of the law and assertions of fact that simply cannot be reconciled with the record. This Texas Constitution prohibits private interest give aways; the "gratuitous payments [of public funds] to individuals, associations and corporations." *Texas Mun. League Intergovt'l Risk Pool v. Texas Workers' Comp. Comm'n*, 74 S.W.3d 377, 383 (Tex. 2002). But no give-away is present in this case. Negotiated government contractual agreements,

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[7] *See Cheatham v. DiCiccio*, 379 P.3d 211 (Ariz. 2016); *Rozenblit v. Lyles*, 243 A.3d 1249, 1267 (N.J. 2021).

like the CBA here, which is aimed at securing ordered and efficient fire and emergency services for the citizens of Austin, do not fit within the Texas gift clause analysis in the manner Petitioners advocate. No Texas precedent supports that construction of government contracts. Moreover, the Texas Legislature specifically authorized collective bargaining between municipalities and their first responder employees and made the legislative finding that such activities operated to the public benefit, consistent with the importance of the vital services municipalities must provide. Op. at *2.

Petitioners ignore the trial court's many specific factual findings, which they failed to challenge on appeal, and instead attempt to recast the trial record in ways that contradict competent testimony and other evidence supporting Respondents' contentions at trial. Article 10 of the Respondents' CBA provides a bank of paid leave that may be used by Austin's fire fighters, and it, along with the other terms of the CBA, was the subject of extensive, arm's-length negotiations between the City and the AFA. The CBA, including the ABL bank provided in Article 10, is supported by valid consideration on both sides, predominantly serves important public purposes, and affords clear public benefit in return; at all times, the City has retained sufficient control over any public funds associated with its employees' use of ABL. These facts have never been in meaningful dispute during the years-long course of

this litigation, and the trial court's rulings, as affirmed by the appellate court, should stand.

ARGUMENT

Association Business Leave ("ABL") is provided as part of an arm's-length agreement, in exchange for valid consideration; it is no "gift" of public funds. Furthermore, the trial and appellate courts correctly applied the law in determining that the Agreement, including the ABL provision, serves a predominantly public purpose and affords a clear benefit to the community served by the Department in return, subject to sufficient controls to ensure the City's investment is protected. Therefore, this Court should deny Petitioners' request for review and affirm the rulings below.

I. Petitioners Failed to Demonstrate that Respondents Violated the Gift Clause, and the Petition Should be Denied and the Ruling Below Affirmed

a. The "Gift Clause" Prohibits *Gratuitous* Grants of Public Funds, Not Contracts

Petitioners' ill-conceived challenge to a *contract* provision providing *current City employees* with paid leave does not implicate the Texas Constitution's "Gift Clause."

This Court, in *Texas Municipal League Intergovernmental Risk Pool v. Texas Workers' Compensation Commission*, 74 S.W.3d 377 (Tex. 2002), stated the Gift Clause analysis—and its focus on *gratuitous* payments—as follows:

> We have held that section 52(a)'s prohibiting the Legislature from authorizing a political subdivision "to grant public money" means that the Legislature cannot require *gratuitous* payments to individuals, associations, or corporations. A political subdivision's paying public money is not "gratuitous" if the political subdivision receives return consideration.
>
> Moreover, we have determined that section 52(a) does not prohibit payments to individuals, corporations, or associations so long as the statute requiring such payments: (1) serves a legitimate public purpose; and (2) affords a clear public benefit received in return. A three-part test determines if a statute accomplishes a public purpose consistent with section 52(a). Specifically, the Legislature must: (1) ensure that the statute's predominant purpose is to accomplish a public purpose, not to benefit private parties; (2) retain public control over the funds to ensure that the public purpose is accomplished and to protect the public's investment; and (3) ensure that the political subdivision receives a return benefit.

Tex. Mun. League, 74 S.W.3d at 383-84.

The *Texas Municipal League* standard needs no clarification, nor does the record here present an opportunity for the Court to clarify this standard, given Petitioners' failure to challenge the trial court's findings of fact or otherwise provide a basis to find any element of this standard—even if retooled to meet Intervenor-Petitioner's eleventh-hour resort to a century-old case—lacking.

As observed by this State's courts for decades, the constitutional provisions collectively referred to as the "gift clause" or "gift clauses" are set forth in Article III, Sections 50, 51, and 52(a), and Article XVI, Section 6(a) of the Texas Constitution. Each of them is "intended to prevent the application of public funds to private purposes; in other words, to prevent the ***gratuitous grant*** of such funds to any individual, corporation, or purpose whatsoever." *Byrd v. City of Dallas*, 6 S.W.2d 738, 740 (Tex. [Comm'n Op.] 1928) (emphasis added). As the *Byrd* court explained, if the act in question "is a gratuity or donation to the beneficiary, it is clearly forbidden by the fundamental law," but "if it is part of the compensation of such employee for services rendered to the city, ***or if it be for a public purpose***, then clearly it is a valid exercise of the legislative power." *Id*. (emphasis added). Simply put, the Constitution's gift clause is not an abstract restriction on the government's ability to negotiate and enter into contractual agreements, especially those agreements deemed to be imperative to preserving public safety.

This fundamental focus of the inquiry, on whether a government expenditure is a gratuitous grant to a private party, flows directly from the gift clause provisions themselves, which restrict the power to "give or lend," Const., art. III, sec. 50, "make any grant," art. III, sec. 51, "lend . . . credit or to grant," art. III, sec. 52(a), or to make an "appropriation for private or individual purposes," art. XVI, sec. 6(a).

For a century, this Court has accurately and consistently observed that these sections operate to prevent the *gratuitous* grant of public funds or property for private purposes rather than public purposes, not to prevent the government from entering into contracts or to require that every expenditure benefits strictly the government to the exclusion of all others. *See*, *e.g.*, *Tex. Mun. League*, 74 S.W.3d at 389 (Tex. 2002) (stating that the purpose of Art. III, Sec. 52 is to prevent the "*gratuitous* appropriation of public money or property" (emphasis added)); *City of Corpus Christi v. PUC of Tex*., 51 S.W.3d 231, 240 (Tex. 2001) (explaining that the primary purpose of Art. III, Sec. 51 and Art. XVI, Sec. 6 "is to prevent the application of public funds for private purposes; in other words, to prevent the ***gratuitous*** grant of such funds to any individual or corporation whatsoever" (emphasis added)); *State v. Austin*, 160 Tex. 348, 355 (Tex. 1960) (same, addressing a challenge based on Art. III, Sec. 50-51, and Art. XVI, Sec. 6).

Indeed, this is true even of the opinion relied on by Intervenor-Petitioner, *Bexar Cnty. v. Linden*, 220 S.W. 761 (1920), in its wrongheaded argument in favor of rewriting the *Texas Municipal League* test. *See* Pet. Tex. Br. at 20-28. Rather than prohibit any expenditure—gratuitous or not—that benefited interests other than "strictly governmental purposes," that Court observed that the Texas Constitution provides that "[t]he ***giving away of public money***, its application to other than

strictly government purposes, is what the provision is intended to guard against." *Id*. at 344.

This has long been the explicit opinion of the Texas Attorney General as well. *See* Tex. Att'y Gen. Op. No. GA-0664, 2008 Tex. AG LEXIS 79 (Sep. 12, 2008) ("Article III, section 52(a) prohibits only gratuitous grants of public money by a political subdivision," and paraphrasing *Tex. Mun. League* as "emphasizing that 'to grant public money' [in article III, section 52(a)] means that the Legislature cannot require *gratuitous* payments'").

The trial court, as affirmed by the court of appeals, correctly ruled that the Petitioners failed to establish that an arm's-length CBA between the City and its employees was a *gratuitous* grant of public funds. *See Tex. Mun. League*, 74 S.W.3d at 383; Op. at *5-7. Petitioners now seek to escape the trial court's well-grounded conclusions by undoing basic precepts of contract law: arbitrarily ignoring all the other terms of the CBA and insisting that each party must share a balanced mutuality of obligation on each individual term of the contract.

Understandably, the Texas Constitution "requires only sufficient -- not equal -- return consideration to render a political subdivision's paying public funds constitutional." *Tex. Mun. League*, 74 S.W.3d at 384. Such wholesale picking apart of individual terms of a government contract in an effort to determine whether each

individual term involved a perfect balance of consideration on both sides is unworkable and inconsistent with the Constitution's ban on gifts. For a factfinder to evaluate the *equality* of consideration in a fully-negotiated contract term, as opposed to the *sufficiency* of consideration, invites a level of judicial micro-management and oversight that is not contemplated in the gift clause. Nowhere in this proceeding have the Petitioners challenged the public purpose of the CBA as a whole (nor could they), and because Article 10 is included in the non-gratuitous Agreement, supported by valid consideration on all sides, Petitioners have therefore failed to establish a constitutional violation and the judgment below must be affirmed.

i. The Contract Must Be Considered as a Whole

Petitioners isolate a single provision of a 105-page, 32-article CBA and pretend the balance of the contract simply does not exist. As blackletter law and this Court have clearly instructed, however, courts must "examine the entire agreement when interpreting a contract and give effect to all the contract's provisions so that none are rendered meaningless." *Stine v. Stewart*, 80 S.W.3d 586, 589 (Tex. 2002). "[I]ndividual paragraphs of a contract are not separate and divisible contracts." *Howell v. Murray Mortg. Co.*, 890 S.W.2d 78, 86-87 (Tex. App.—Amarillo 1994, writ denied) (citing *Pace Corp. v. Jackson*, 284 S.W.2d 340, 344 (Tex. 1955)). Thus, it is inappropriate to assess the consideration recited in each individual sub-part or

sub-paragraph of a contract; the correct analysis is of the consideration underlying the contract as a whole. *See In re Palm Harbor Homes, Inc.*, 195 S.W.3d 672, 676 (Tex. 2006) ("[W]hen an arbitration clause is part of a larger, underlying contract, the remainder of the contract may suffice as consideration for the arbitration clause.").

Put another way, "mutuality of obligation in each individual clause of a contract is unnecessary where there is consideration given for the contract as a whole." *Howell*, 890 S.W.2d at 86-87; *see also Farmers' State Bank v. Mincher*, 290 S.W. 1090, 1091 (Tex. 1927) ("[T]he provision relating to interest is subsidiary to the principal contract and is supported by the same consideration. When a promise is thus supported by a valuable consideration, the fact that the promise is not also supported by a corresponding obligation on the part of the promisee becomes of no importance."); *see also Fortner v. Fannin Bank in Windom*, 634 S.W.2d 74, 77 (Tex. App.—Austin 1982, no writ) ("A basic principle of contract law is that one consideration will support multiple promises by the other contracting party." (citing Restatement (Second) of Contracts, § 80(1) (1981)). Petitioners' claim that Article 10, because it to some extent supports the interests of the AFA, must require some "services" in direct exchange from the AFA, *while* ABL is being used by the employee, finds no basis in the law. *See* Pet. at 17-19. The extensive consideration

detailed by the appellate court and in this brief, *supra* pp. 3-6, is more than adequate to support Article 10.

Indeed, Petitioners' arguments on this point have been rejected by the high court of every jurisdiction to which their attorneys have made them. *See Rozenblit v. Lyles*, 243 A.3d 1249, 1259 (N.J. 2021) ("The release time arrangement is part of an agreement arrived at through collective negotiations in which the Association made concessions in return for provisions that it sought. It is one of many provisions of the CNA bargained for through the collective negotiations process."); *Cheatham v. DiCiccio*, 379 P.3d 211, 219 (Ariz. 2016) (citations omitted) (rejecting a virtually identical gift clause challenge and reasoning "we cannot consider particular provisions in isolation"); *see also Gilmore v. Gallego*, 529 P.3d 562, 571 (Ariz. Ct. App. 2023) (rejecting another gift clause challenge to official time by Petitioners' counsel, following *Cheatham* and finding no constitutional violation when applying the "panoptic view" of the transaction).

As the Arizona Supreme Court explained, "[f]or example, if such an agreement provided for paid vacation or personal leave time for public employees, the adequacy of the consideration received by the employer would not be evaluated by asking if the employees must use their time in a way that benefits the employer." *Cheatham*, 379 P.3d at 219. Rather, courts must assess the entire transaction,

including the work the public employees "generally agree to provide under the agreement." *Id*. The same reasoning applies here. When considering Article 10 of the CBA in the appropriate context of the Agreement as a whole, it is beyond any question that the CBA, and all of its terms, are supported by adequate consideration.

i. The Uncontroverted Record Establishes that the City Received Myriad Forms of Valuable Consideration, Including Promises from AFA Directly

In addition to the services provided by AFD's fire fighter employees, the trial and appellate courts correctly found that the CBA (and therefore Article 10) was otherwise supported by valuable, sufficient consideration in the form of concessions made regarding terms of employment, explicit promises and obligations undertaken by the AFA itself, and—although in no way required under the law—a specific exchange made at the bargaining table when the original form of Article 10 was first agreed. No "gift" of public funds is present here.

The uncontroverted record established that the City receives valuable consideration in the form of concessions by the AFA and its members under Texas Local Government Code Chapter 143, including City-favoring changes regarding employee hiring, promotions, disciplinary investigations, disciplinary appeals, allowing for differences in base wages based upon seniority, longevity pay, required certifications, required education, specialized assignments, the designation of

personnel in certain positions with certain leave and pay levels, drug testing, and the ability to merge the Austin Fire Department with Travis County Emergency Services Districts. 7.RR.5-109 (CBA) at Arts. 12, 16; 3.SCR.210, 214-15 (Flores); 3.SCR.283-84, 286-87, 291 (Paulsen); 3.SCR.259-261 (Woolverton). Absent those concessions in the CBA, important employment terms between the City and its fire fighters would instead be governed by the State's civil service laws and the City therefore views those terms as a vital and valued part of the Agreement. *See* TEX. LOCAL GOV'T CODE § 174.006(a) (a "civil service provision prevails over a [CBA] under this chapter unless the [CBA] specifically provides otherwise"). These concessions, as the court below found, *see* Op. at 6, readily constitute sufficient consideration under the gift clause analysis.

Petitioners again claim, in brazen disregard of the unambiguous record, that "the AFA has not obligated itself to perform *any* duties, or give anything in return, for the ABL hours it receives." Pet. Br. at 18. This argument completely ignores the fact that the employees AFA represents, the City fire fighters, are bound by the terms and obligations of the CBA. Furthermore, under blackletter Texas law, "mutuality of obligation in each individual clause of a contract is unnecessary where there is consideration given for the contract as a whole." *Howell*, 890 S.W.2d at 86-87. But in fact, the unambiguous terms of the CBA directly bind the AFA to multiple,

specific obligations. For example, Article 7 requires the AFA to provide notice of dues withholding, furnish a list of AFA members to the City, and reimburse the City $.10 for every dues deduction made. 7.RR.5-109 (CBA) at Art. 7. In Article 8, the AFA agrees not to have *ex parte* communications with members of the Civil Service Commission. 7.RR.5-109 (CBA) at Art. 8. In Article 11, the AFA agrees not to use "personal attacks or inflammatory statements" regarding the Department and promises to "permit the Fire Chief space for a column in the 'Smoke Signal' (or other successor publication) in which to address rumors." 7.RR.5-109 (CBA) at Art. 11. In Article 17, the AFA agrees to "provide a class before the academy begins to the academy staff and team leaders on contract compliance as it relates to training standards." 7.RR.5-109 (CBA) at Art. 17, Part B, Sec. 6(A). Further, Article 20 requires the AFA to process, attempt to informally resolve, and submit written grievances on behalf of the bargaining unit members who submit a "valid" grievance. 7.RR.5-109 (CBA) at Art. 20.

Moreover, although not necessary for Article 10 to be enforceable, there was a specific "give and take" in the bargaining process in 2009, in which the City exchanged the current ABL bank for a change in the treatment of sick leave from "productive leave" that counted towards employees' hours worked for purposes of calculating overtime to "nonproductive leave" that did *not* count towards employees'

hours worked. *See* 3.RR.21-22 (Jan. 17, 2017 Hr'g Tr.) (Nicks). In exchange for providing its employees ABL, the City received "5 to $600,000" per year in estimated overtime savings. *Id*. Thus, even taking the impermissibly narrow view urged by Petitioners, the ABL provision *itself* was bargained in exchange for adequate consideration.

Intervenor-Petitioner's argument that ABL use categorized as "other association business" was not bargained for—which is raised for the first time in its brief before this Court and therefore waived, *see* Tex. R. App. P. 33.1—is not borne out by the record. Article 10 of the Agreement provides that ABL may be used for "association business *activities* that directly support the mission of the Department or the Association" (emphasis added) and then defines "association business" to include "time spent in Collective Bargaining negotiations, adjusting grievances, attending dispute resolution proceedings, addressing cadet classes . . . and attending union conferences and meetings." 7.RR.5-109 (Joint Ex. 1) (CBA) at Art. 10(B)(2). The approval process, including the detailed "Purpose of Request" field, allows AFD to determine if each ABL activity supports or relates to association business, even if labeled "other association business." Indeed, the record demonstrates that the activities for which "other association business" ABL is used—primarily meeting

with membership—fit directly within at least one of the enumerated categories of association business, if not multiple categories.[8]

Intervenor-Petitioner's stilted reading of the Agreement, a contract to which it is not a party, does not trump the contracting parties' mutual understanding of the terms to which they have agreed. The "Purpose of Request" field, as well as the parties' open lines of communication facilitated by Chief Nicks and Association members using ABL, allows AFD to police the activities for which ABL is used to ensure that it remains within the terms of the Agreement. Intervenor-Petitioner's facile argument that the "other" label in AFD's reporting software renders all ABL requested under that label extra-contractual—even that argument was not waived—finds no support in the record.

Beyond these many City-favoring concessions and direct promises made by the AFA, the AFD employees' services themselves—performed subject to the terms the City negotiated in the CBA—also constitute sufficient consideration under the gift clause. When assessing the issue of consideration, the law is clear: performance of employment duties is sufficient consideration for benefits and other compensation

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[8] *See, e.g.*, 3.SCR.318-19 (Nicks) ("mostly that's going to be the VP's going to station visits. . . . a good deal of our time is going out and — and educating our members, and then soliciting feedback from our members"); 5.RR.125:7-20 (Nicks) (describing ABL use for public events that fit the meaning of union "meetings" or "conferences").

provided by a public employer. *See Byrd*, 6 S.W.2d at 740; *City of Corpus Christi v. Herschbach*, 536 S.W.2d 653, 657 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.), *superseded by statute on unrelated grounds as recognized in City of Houston v. Soriano*, No. 14-05-00161-CV, 2006 Tex. App. LEXIS 7666, *14 n.5 (Tex. App.—Houston [14th Dist.] Aug. 29, 2006, pet. denied); *City of Galveston v. Landrum*, 533 S.W.2d 394 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.); *Devon v. City of San Antonio*, 443 S.W.2d 598 (Tex. Civ. App.—Waco 1969, writ ref'd); *City of Orange v. Chance*, 325 S.W.2d 838, 841 (Tex. Civ. App.—Beaumont 1959, no writ). The courts below, therefore, correctly concluded that, because the Agreement is supported by the consideration of City employees' services (among a great deal of other consideration), it is non-gratuitous and does not violate the gift clauses. Op. at *5-7.

In sum, because the CBA is an exchange of valid, bargained-for consideration, it does not violate the Constitution's gift clause. Even when evaluated in isolation, ABL was explicitly bargained in exchange for valuable consideration. Given that ABL was not gratuitously granted and Petitioners have not fielded any argument that the CBA as a whole fails to serve a predominantly public purpose and provide the City with a clear public benefit in return—namely in the form of fire and emergency services run in an efficient manner consistent with the City's bargained-for terms of

employment—Petitioners' claims fail, and the petition should be dismissed and the rulings below affirmed.

ii. Petitioners, Who Have Not Brought and Lack Standing to Bring a First Amendment Challenge, Fail to Demonstrate that the First Amendment Would Alter the Gift Clause Analysis

Petitioners' misplaced First Amendment arguments do nothing to disturb the conclusion that AFD employees' fire services, performed under those terms and conditions negotiated by the City in the Agreement, constitute valid, sufficient consideration for the CBA, including Article 10. To begin with, as the court of appeals observed, no funds are paid directly to the AFA whatsoever. Op. at *5. Likewise, no funds are paid by any City employee for others on ABL. Rather, City funds are used to pay City employees using the leave—just as an employee is paid as a benefit while on vacation or paid time off—by the City, in consideration for the services the employee provides, consistent with the terms of the CBA.

As the Arizona Court of Appeals recently observed in a similar suit, "[t]here is no claim that plaintiffs are credited with phantom or other wages that are never received because they are reduced by required Union dues or deductions or any other payment mechanism that violates *Janus* [*v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018)]." *Gilmore v. Gallego*, 529 P.3d 562, 568 (Ariz. Ct. App. 2023). The court also noted that, "[s]imply put, plaintiffs are not forced to

make any payments to the Union, in any respect. The release time is paid by the City, not by deductions from . . . employees' wages." *Id*. The same is true here: employees who choose to use ABL are permitted, under the Agreement, to spend their own time on leave, if approved by AFD. That City employee is paid by the City when on leave—as they are paid while on vacation, sick or paid time off—in consideration for that employee's services, among other valid consideration supporting the Agreement.

Petitioners' argument on this point falls doubly flat given that the record evidence establishes that AFD employees can and have used ABL, even if they are not members of the AFA. 4.RR.124-25. Petitioners' demonstrably incorrect statement that "only Union members may use association leave," appears to stem from a misunderstanding of the term "bargaining unit member." *See* Pet. Tex. Br. at 34 (citing CR.4212 and reciting that only a "member of the bargaining unit may request" ABL). In fact, the uncontroverted evidence at trial established that employees ***who are not members of AFA***, but who nonetheless are bargaining unit members because they are AFD employees, have requested approval for and used ABL. *See, e.g.*, 4.RR.124-25.

Moreover, even if it were somehow true that the City paying employees on ABL would violate the prohibition on unauthorized dues withholding in *Janus*, that

issue is not properly before this Court. Petitioners lack any standing to assert that violation in this proceeding, as they are not the holders of Austin fire fighters' First Amendment rights. *See Janus*, 138 S. Ct. at 2462 (noting the Illinois Governor's dismissal from the trial court proceeding for lack of standing prior to the intervention of the employee plaintiffs). Moreover, even if Petitioners did have standing to challenge Article 10 on the grounds that it violated the First Amendment rights of non-plaintiffs, which they do not, they failed to do so before the trial court. *See* CR.1757- (First Am. Plea in Intervention of Texas) (asserting no First Amendment challenge); CR.3822-32 (Second Am. Pet.) (asserting no First Amendment challenge).

Finally, even if Petitioners had established that Article 10 violated the First Amendment rights of the bargaining unit members who are not members of the AFA—and they have established no such thing, at trial or otherwise—the AFA *members'* services as fire fighters, performed under the terms and conditions negotiated by the City under the Agreement, would nevertheless remain valid consideration. Intervenor-Petitioner argues, relying on *Lewis v. Davis*, 199 S.W.2d 146, 149 (1947), that acknowledging fire fighters' services as consideration for the Agreement would result "in a violation of law." Pet. Tex. Br. at 31. For the reasons stated, Respondents vehemently disagree with Petitioners' assertion of course. But

even if the Court must "choose a reading" of the consideration at issue, Petitioners have done nothing to explain why the consideration afforded by AFD *members* under the terms of the Agreement must also be ignored. *See Lewis*, 199 S.W.2d at 149 (ruling that the contract "must be held valid and not illegal" because "[a] contract that *could* have been performed in a legal manner will not be declared void because it *may* have been performed in an illegal manner" (emphasis added)). Petitioners therefore have again failed to demonstrate that the Agreement lacks sufficient consideration under the gift clause.

Petitioners have not brought and lack standing to bring a First Amendment challenge to Article 10. No such claim has been or can be litigated here. With respect to the gift clause challenge actually at issue in this lawsuit, given that the fire and emergency services provided by AFD fire fighters under the terms of the Agreement amply support the ABL provision, as well as the contract as a whole, there is no unconstitutional gift to private interests present here.

b. The CBA, Including the ABL Term, Serves a Legitimate Public Purpose and Affords a Clear Public Benefit in Return

Even if the existence of valid consideration were not enough to resolve Petitioners' gift clause claims, Petitioners have still failed to establish a constitutional violation. Under the well-reasoned *Texas Municipal League* test, grants of public funds are still constitutional where the statute or ordinance

authorizing the payments: "(1) serves a legitimate public purpose; and (2) affords a clear public benefit received in return." *Tex. Mun. League*, 74 S.W.3d at 383-84 (citations omitted). In turn, a payment "serves a legitimate public purpose" if (1) "the statute [rendering the payment]'s predominant purpose is to accomplish a public purpose, not to benefit private parties;" (2) the municipality "retain[s] public control over the funds to ensure that the public purpose is accomplished and to protect the public's investment;" and (3) "the political subdivision receives a return benefit." *Id*. (citations omitted).

The record below demonstrates unmistakably that the trial court's conclusions were correct: the CBA negotiated between the City of Austin and its fire fighters through the AFA serves a predominantly public purpose and affords a clear public benefit in return, as does the ABL provision itself, and the City has retained sufficient control over the Department—and even over the administration of ABL itself—to protect its investment.

i. Determining Public Purpose is a Function of the Legislature

"Determining a public purpose is primarily a function of the legislature, and it should be upheld unless it is manifestly arbitrary and incorrect." *Young v. Houston*, 756 S.W.2d 813, 814 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (citing

Bland v. City of Taylor, 37 S.W.2d 291, 293 (Tex. Civ. App.—Austin 1931), *aff'd sub nom. Davis v. City of Taylor*, 67 S.W.2d 1033 (Tex. 1934)).

The Texas State Legislature, in the Fire and Police Employee Relations Act, has declared by law that:

> The policy of this state is that fire fighters and police officers, like employees in the private sector, should have the right to organize for collective bargaining, as collective bargaining is a fair and practical method for determining compensation and other conditions of employment. Denying fire fighters and police officers the right to organize and bargain collectively would lead to strife and unrest, consequently injuring the health, safety and welfare of the public.

TEX. LOCAL GOV'T CODE § 174.002(b). Moreover, the Austin City Council, by authorizing negotiations and ratifying the CBA, has recognized the CBA and its terms serve a public purpose. Thus, the Austin City Council and the Texas Legislature are in agreement: the health, safety and welfare of the public is served by a well-trained and motivated staff of first responders focused on public safety rather than employee "strife and unrest." The City's fully negotiated CBA—which includes the ABL provision—serves that mission by carefully balancing the interests of employees and their government employers while promoting an effective, well-trained and well-managed fire department.

ii. The CBA, and the ABL Term, Serve a Predominantly Public Purpose and Afford a Clear Public Benefit in Return

Taking the appropriate panoptic view, the CBA's predominant purpose is to

secure safe and efficient fire safety and emergency services for the citizens of Austin, an unquestionable—and unquestioned in this litigation—public purpose. TEX. LOCAL GOV'T CODE § 174.002; 7.RR.5-109 (Joint Ex. 1) (2017-2022 CBA) at Art. 1(2). It does so by maintaining a harmonious labor-management relationship, fostering good morale among the City's fire fighters, setting fair and attractive wages, benefits, and other conditions of employment agreeable to both employer and employee, and allowing for fair and orderly adjustment of grievances under the CBA. *See* 7.RR.5-109 (Joint Ex. 1) (2017-2022 CBA) at Art. 8 ("Civil Service Commission"), Art. 9 ("Wages & Benefits"), Art. 12 ("Leave Provisions"), Art. 14 ("Hours of Work"), Art. 15 ("Overtime"), Art. 17 ("Hiring & Cadet Training"), Art. 20 ("Contract Grievance Procedure"), Art. 22 ("Health Related Benefits"), Art. 24 ("Drug Testing"); *see also* 3.SCR.210 (Flores); 3.SCR.229, 231 (Woolverton); 3.SCR.283-84 (Paulsen).

Petitioners' attempts to carve Article 10 out from the Agreement in which it was negotiated are illogical and impracticable. First, the argument is entirely circular. Petitioners claim that Article 10 must be severed from the Agreement because they challenge only Article 10 as unlawful, and they claim it is unlawful because it has been severed from the Agreement and must be considered in isolation. *See, e.g.*, Pet. Tex. Br. at 37 ("But Plaintiffs do not contest the constitutionality of

the Agreement – they contend only that the association-leave provision is unconstitutional"). Petitioners' logical fallacy should have no bearing on this Court's analysis.

Second, Petitioners' proposed analytical framework—analyzing only the public purpose of a challenged provision of an agreement rather than the agreement as a whole—could render essentially all government contracts unconstitutional. Their approach would invite litigants to bring suits to dissect government contracts in an effort to determine whether isolated terms, standing alone, were supported by sufficient consideration. Under Petitioners' theory, wages—if challenged independently from the employment agreement in which they are promised—would serve no public purpose. The public benefit received from that employee's promise to provide services, if not the part of the agreement directly challenged, could not be considered, rendering those wages an unconstitutional gratuity to private parties. Bargained-for payments to a pension fund, for later distribution to former employees in consideration for their employment, if challenged in isolation, would be indistinguishable from a public welfare program. Clearly, the Petitioners' wrongheaded analysis cannot be followed here.

Nevertheless, even when considered in isolation, the ABL provision of the CBA still serves a predominantly public purpose and affords a clear return benefit.

The primary use of ABL is to allow AFA members to participate in collective bargaining, labor-management meetings, membership meetings, disciplinary and grievance proceedings, or other activities that support the mission of the Department. *See supra* pp. 6-9. As the lower court noted, the AFA's mission "overlaps with the mission of the AFD." Op. at *8. Aside from their own preferences, Petitioners have failed to establish any basis to overturn the legislative judgment that the CBA and ABL serve a predominantly public purpose.

Indeed, the objectives of a labor association and an employer frequently align in favor of the public good, as courts recognize. *See United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (U.S. 1960) (recognizing the importance of a properly functioning grievance arbitration system "in achieving industrial peace"); *accord* TEX. LOCAL GOV'T CODE § 174.002. In rejecting an argument identical to the one raised by Petitioners here, the Arizona Supreme Court explained that "a public purpose may be served by [the labor organization's] representational activities to the extent they promote improved labor relations and employment conditions for public safety officers." *Cheatham*, 379 P.3d at 218. Here, as in *Cheatham*, ABL serves a public purpose and provides substantial benefit to the City in the form of harmonious labor relations and improved employment conditions for Austin's fire fighters, all of which benefit public safety the City must preserve.

Petitioners argue that the so-called "private" purposes of the AFA are inherently incongruent with the City's "public" purposes, but that overly simplistic reasoning ignores the reality of the situation. In fact, the trial court found, with ample record support, that the "[t]he missions of the AFD and AFA overlap and are not mutually exclusive." CR.4209 (Am. FOF & COL) at ¶9. Indeed, the AFA, in the CBA, has pledged to "to support the service and mission of the Austin Fire Department, [and] to constructively support the goals and objectives of the Austin Fire Department" in the parties' CBA. 7.RR.5-109 (Joint Ex. 1) (2017-2022 CBA) at Art. I(2). And as amply supported on the record, this is no incidental or small overlap in purpose; the AFA's efforts have provided numerous important public benefits to the City.

To begin with, although Petitioners, as below, attempt to suggest that Chief Nicks "engages in political and lobbying activities" while using ABL, *see, e.g.*, Pet. Tex. Br. at 3 (citing 4.RR.67:23-68:6), Chief Nicks repeatedly testified that he did *not* use ABL for any political or lobbying activities. *See, e.g.*, 5.RR.103:23-104:11 (Nicks) ("Like I've testified over and over, my work week is well over 40 hours, and I believe that I am not on ABL when I'm doing political activities . . . .").[9] The trial

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[9] *See also* 5.RR.150:3-151:11, 152:5-20, 174:16-174:22.

court was entitled to credit Chief Nicks' testimony on this point, that he reserves political and lobbying activities for his non-duty hours in excess of 40 each week, and Petitioners cannot simply pretend Chief Nicks' completely unchallenged testimony on this subject does not exist.

Moreover, the record contains overwhelming evidence of the *non*-political activities Chief Nicks performs while on ABL. As detailed above, Chief Nicks regularly meets with AFD management to discuss AFD operations and public safety issues; he provides "a lot of value" to the City by bringing forward safety and operational issues concerning the City's fire fighters; and he spends a "significant amount of [his] time . . . communicating messages from the Fire Department management to the AFA membership." 5.RR.145:24-146:24; 5.RR.146:25-147:3; 5.RR.154:21-155:10; 4.RR.252:5-21.

Likewise, the primary uses of ABL by the AFA's members—to participate in collective bargaining, meet with other fire fighters to discuss issues related to the CBA and Department policy, participate in labor-management meetings, meet to discuss or represent fire fighters in disciplinary and grievance proceedings, participate in informal dispute resolution proceedings, and conduct other lawful activities that support the Department's and the AFA's overlapping missions—collectively and individually serve a predominantly public purpose. *See supra* pp. 6-

9; *see also* 4.RR.179:13-181:7 (Paulsen) (benefits of member use of ABL includes participating in "oversight committees" like the weekly "cadet hiring oversight committee," in which the committee "will make recommendations to the Fire Chief about, for example, should we have, you know, hours of college education as a requirement or not have them; should we have a certain portion of the process included or not included. The Fire Chief still has the management right to do a thumbs up or thumbs down, but he looks at these committees as a valued contribution in that they're representing lots of different perspectives."); 4.RR.179:13-179:20 (Paulsen) (City considers it beneficial that ABL allows fire fighters to attend "a labor management initiative where we come together once a month and talk about issues.").

Petitioners failed to show that the CBA—or even ABL itself—serves anything other than a predominantly public purpose, affording the City a clear benefit in return.

iii. The City Retains Sufficient Control

The courts below correctly concluded that the City possesses adequate control under the CBA to protect its investment. Despite Petitioners' characterization, the compensation and benefits afforded under the CBA were not given away without the public getting anything in return—and indeed, they were not given *to the AFA* at all,

but rather made available *to the City's employees*, in return for their valued public service, among other consideration. The binding contract itself constitutes sufficient public control. *See Chisholm Trail*, 2017 Tex. App. LEXIS 4285, at *16-17 (considering a challenged contract, "even if the District were required to retain some degree of control, the Agreements expressly grant the District control going forward"). *Cf. Key v. Commissioners Court of Marion Cnty*, 727 S.W.2d 667 (Tex. App.—Texarkana 1987, no writ) (rights and obligations under contract probative on the issue of control). Here, the binding CBA allows the City sufficient control to protect its investment in the AFD's fire and rescue services and—even viewed more narrowly—sufficient control to protect its investment in ABL.

Under the CBA, the City retained the right to "change those benefits, privileges, and working conditions which it determines, in accordance with this subsection, to interfere with the operations of the Department." 7.RR.5-109 (Joint Ex. 1) (CBA) at Art. 27(2). Like all public employers, the City also retained its right to manage its employees, including:

> [D]irection of the work force, including but not but not limited to, the right to hire; the right to discipline or discharge in accordance with Chapter 143 and this Agreement; the right to decide job qualifications for hiring; the right to layoff or abolish positions; the right to make rules and regulations governing conduct and safety; the right to determine schedules of work together with the right to determine methods, processes, and manner of performing work; the right to evaluate, supervise, and manage performance of employees; the right to

> determine the size of the work force, and the assignment of work to Fire Fighters within the Department, including the right to transfer Fire Fighters; the right to determine policy affecting the selection of new Fire Fighters; the right to establish the services and programs provided by the Department, including the nature and level of such services and programs, as well as the type and quantity of resources allocated; the right to establish work performance measurements and standards; and the right to implement programs to increase the cost effectiveness of departmental operations.

7.RR.5-109 (Joint Ex. 1) (CBA) at Art. 4. Thus, the City retains more than adequate controls over its workforce. *See Chisholm*, 2017 Tex. App. LEXIS 4285, at *16-17.

Even considering ABL alone, the City still retains sufficient control: it possesses the contractual right to specify through departmental policy the "[a]dministrative procedures and details regarding the implementation" of the ABL provision contained at Article 10 of the CBA. *See* 7.RR.5-109 (Joint Ex. 1) (CBA) at Art. 10(2)(D). Further, the City reviews ***all*** ABL requests and retains the right to deny requests for operational needs or noncompliance with the CBA. 7.RR.5-109 (Joint Ex. 1) (CBA) at Art. 10(1)(C)–(D); 5.RR.127:6-15 (Nicks); 4.RR.115:23-116:9 (Woolverton) ("Q. . . . is it possible for a firefighter to use [ABL] without the Fire Department's approval? A. No.").

Moreover—although it is the *right* to control that is material—the City *does in fact exercise* its right to disapprove ABL requests from employees. *See, e.g.*, 4.RR.113:13-114:14 (Woolverton) (describing a denial of ABL request for purposes

the AFD determined would have been political); 5.RR.160:12-161:11 (Nicks) (denial for budgetary reasons). This right of control over ABL use is more than sufficient to show that the legitimate public purposes behind the provision of ABL—that is, to provide for stable, efficient, and effective fire safety and emergency services in Austin—are being protected.

Petitioners suggest the Constitution requires the City to precisely monitor and control every aspect of ABL use by its employees in order for the control to be sufficient. But the City is not required to monitor the minute-by-minute activities of employees who are out on leave and not at work—indeed, tracking an employee's ABL activities by the minute is no more constitutionally required than mandating surprise home visits of employees who call in sick, just to confirm they are in bed with a hot water bottle. It is telling that Taxpayer-Petitioners were unable or unwilling to identify exactly what *would* be constitutionally sufficient public control over use of ABL. *See* 5.RR.58:14-59:18 (Borgelt) (declining to answer which controls he would find sufficient). Having failed to point the trial court to any yardstick for measuring the sufficiency of control, it is no surprise the court found Petitioners' claim lacking.

Troublingly, Petitioners again repeat before this Court their demonstrably incorrect claims that "[e]ven after the fact, the City does not know how a large

portion of ABL time is spent," without any citation to the record. Pet. Br. at 4; *see also* Pet. Br. at 13 (claiming, without any citation to the record, that "the record shows that the City does not even know how the vast majority of ABL time is actually spent").

Petitioners' assertions—which have been demonstrated false in multiple rounds of prior briefing—appear to stem from the Petitioners' misleading, but oft-repeated claim that "most ABL hours . . . are simply categorized as 'other Association business' without further detail." Pet. Br. at 4 (citing 7.RR.453 ¶¶48-50); *see also* Pet. Br. at 13 (referring to it as an "unaccounted-for category of time") (citing 7.113-15, 448); Pet. Br. at 4, 30 (same); Pet. Br. at 13 (Petitioners claiming that "of the time reported to the City for ABL used by 'other Authorized Association Representatives,' less than 25 percent was specifically identified by use!"). In support of these contentions, Petitioners rely exclusively on three stipulated facts reciting yearly ABL summary figures for 2017, 2018, and 2019, *see* 7.RR.453 ¶¶48-50, and four one-page summaries of ABL hours used in 2017 through 2020, *see* 7.113-15, 448.

However, even if the quarterly summaries do not contain the granular detail Petitioners would prefer, the record (as well as multiple prior rounds of briefing) unequivocally establishes that the City *does* possess "further detail" about how ABL

in the "Other Association Business Leave" is used. For each and every ABL request, the City requires that its fire fighters complete a "Purpose of Request" field and, if ever they fail to do so, the request is "kicked back asking for the submitter to put in the required information." 4.RR.116:10-117:15 (Woolverton). Moreover, if the "Purpose of Request" field indicated that the requested ABL activity may be political, "it's something that we would really screen," and "it would, as I said earlier, tickle the conscious [sic] enough that I would want to get the Chief of Staff's input, probably the Fire Chief's input, and probably City legal." 4.RR.121:16-122:14 (Woolverton). And despite Petitioners' misleading claim that most ABL usage is not "categorized" or "identified" by use, the City maintains the "Purpose of Request" field for each ABL request, thereby identifying every hour of "Other Association Business" by its specific, individual use. 4.RR.116:10-117:15 (Woolverton) (authenticating Joint Exhibit 7, an electronic file containing historical "Purpose of Request" information for ABL requests).

Further, even if the CBA does not explicitly require an itemized "accounting" of all activities performed by employees on ABL—though the retention of the "Purpose of Request" information effectively serves as one—it does not follow that the City is actually *unaware* of any activities that are performed by its fire fighters while on ABL. For example, members of AFD management attend AFA's union

meetings and witness first-hand what goes on there. *See, e.g.*, 4.RR.152:25-153:17 (Woolverton) (describing his presence at a recent union meeting). Regular joint meetings, like the weekly cadet hiring oversight committee meetings and the monthly labor-management initiative meetings, are attended by members of AFD management *and* AFA members who use ABL. 4.RR.179:8-179:12 (Paulsen). Similarly, AFD chiefs attend union conferences as do AFA members using ABL and may witness firsthand what that attendance involves. *See, e.g.*, 4.RR.153:18-154:9 (Woolverton) (describing his time spent as the AFD's "Wellness Chief" attending a week-long conference "all about firefighter health and wellness").

Regarding the right to control Chief Nicks' ABL use, Petitioners misleadingly assert that "the City places no prohibitions on [Chief Nicks'] activities while suing [sic] ABL." Pet. Br. at 27 (citing 2.SCR.506-07 at 20:6-12, 21:12-16 (Nicks Dep. Tr.); 2.SCR.448 at 33:9-12, 34:20-22 (Nicks Dep. Tr.)). But when the Petitioners' opaque citations are inspected, the testimony reveals that Chief Nicks actually identified *several* prohibitions on his conduct, including prohibitions on soliciting in uniform, delivering checks, and also testifying that, "[o]f course I am subject to the Code of Conduct. Regardless of whether I'm – I'm working as Battalion Chief or Union President, I'm still a City of – employee. I'm still employed by the City of Austin, and I am subject to those sort of personnel policies, too." 2.SCR.447-48

(Nicks). Indeed, prior to trial, Petitioners stipulated that Bob Nicks was a full-time City employee, that he "is required to follow the City's Code of Conduct" and that he "must physically report to the Fire Department for an emergency or a special project when directed to do so by supervisors, as outlined in the CBA." 7.RR.452 (Am. Joint Stip. of Facts) ¶¶32-35.

Petitioners also assert that Chief Nicks "provides *no accounting of any kind* to the City about his daily activities or how he spends [ABL]." Pet. Br. at 28. But whether Nicks provides a formal "accounting" of what he does while on ABL or not, the record demonstrates that Chief Nicks "regularly attend[ed] meetings with management of the Austin Fire Department," and was "responsive to communications from the Fire Chief or Assistant Chiefs and others," whenever they were made. 4.RR.129:1-12 (Woolverton) (emphasis added); *see also* 5.RR.140:6-140:6 (Nicks) (confirming he is "regularly having meetings with the Fire Chief and the Assistant Chiefs and other members of the Fire Department management" and explaining that when "anybody in the command" calls him, "I pick up immediately, and I deal with every issue they need, provide any perspective of work they need"). In fact, "there would have been an issue had [Chief Nicks] refused to meet with them." 4.RR.129:1-12 (Woolverton). Thus, the City is by no means totally unaware of Chief Nicks' activities while he is on ABL; his time is often spent in response to

calls from management. Chief Nicks has not failed to heed those regular calls for meetings from management and, if he had, "there would have been an issue." *Id*. This certainly demonstrates ample knowledge on the part of AFD management of Chief Nicks' activities while he is on ABL to satisfy Constitutional requirements to avoid gift clause violations.

Petitioners also misleadingly assert, once again, that "[a]lthough other City employees must undergo some form of evaluation of their work performance, no evaluation is conducted for Nicks." Pet. Br. at 28. In fact, the "other City employees" to which the Petitioners misleadingly refer include only ***non-Fire Department personnel***; for Fire Department employees, there were no formal performance evaluations being conducted at all at the time. *See* 5.RR.113:6-8 (Nicks) ("Q. Does the Fire Chief give you performance reviews? A. No, but nobody gets performance reviews in the Department right now because we don't have a process for doing that."); 5.RR.113.18-20 (Nicks) ("An official, like, sit down with a piece of paper review, they don't exist in our department, so the answer is no."); 4.RR.126:18-127:1 (Woolverton) (agreeing that Chief Nicks has a "performance review process that is the same as any other employee of the – any other sworn employee of the Fire Department" and testifying that "he would have been held to the same standard as anyone whether we did [performance evaluations] or didn't do it"). Therefore, the

record reflects that with regard to the formal performance evaluations, Chief Nicks *is not* exempted from any process that all other AFD members must participate in.

Petitioners also claim that the "City has no say in who becomes the AFA President, . . . [and] cannot remove Nicks from his job," Pet. Br. 29, apparently to suggest that the City cannot cease paying ABL. In fact, Petitioners' unexplained citations to the record only establish that the City cannot unilaterally remove Chief Nicks from his role *with the AFA*, and do not relate whatsoever to the City's right to manage and discipline him, up to and including termination, prerogatives of the City which Nicks agrees remain fully intact. As Chief Nicks remains subject to all AFD personnel policies, the City can terminate his employment. And if terminated, Chief Nicks would no longer be able to take any kind of leave AFD employees might use, including ABL.

Intervenor-Petitioner at least acknowledges that the City retains the power to terminate Chief Nicks and thereby immediately cease his availability to use ABL but argues that "whoever the Union president is will be able to use association leave at his or her 'discretion.'" Pet. Tex. Br. at 45. This, Intervenor-Petitioner claims, "does not impact how he uses association leave while he is Union president." *Id*. But this is precisely how an employer exercises management control over an

employee—when conduct is unacceptable, disciplinary consequences up to and including termination can result.

Indeed, Chief Nicks can be—and has been—subjected to Department discipline for time on ABL. 3.SCR.466-68 (Nicks Aff.); 3.SCR.316-17 (Nicks); 3.SCR.257-58 (Woolverton); 4.RR.127:22-128:4 (Woolverton) (Nicks disciplined for Code of Conduct violation as applicable to all employees).

Thus, the continuing use of ABL is subject to the tracking and discretion of the City in ways easily sufficient to protect the City's investment in paid leave under Article 10, and of course, under the contract as a whole. Accordingly, the record evidence overwhelmingly supports the trial court's conclusion that the Petitioners failed to demonstrate any violation of the Texas Constitution, and the petition should be dismissed or the rulings below affirmed.

II. The TCPA Rulings Were Sound and the Petition Should Be Denied or the Rulings Below Affirmed[10]

As the appellate court correctly ruled, there is nothing "logically inconsistent" or "inherently contradictory" about the trial court's rulings on the TCPA motion and

[10] Respondents City of Austin and its City Manager did not move for dismissal of Petitioners' claims pursuant to the TCPA and thus take no position on the following section and the arguments made therein by the AFA.

summary judgment. *See* Pet. at 15; Op. at *15-20. Taxpayer-Petitioners have raised several imaginative, but fundamentally flawed, grounds for overturning the trial court's TCPA dismissal and sanctions award, none of which warrant reversal. As explained below, the TCPA was properly invoked by the AFA, Taxpayer-Petitioners Pulliam and Wiley failed to carry their burden to marshal evidence of a prima facie case against the AFA, and their claims were properly dismissed with prejudice on February 7, 2017. Further, AFA's reluctant return to litigation in 2018, after the Taxpayer-Petitioners amended their Petition seeking to invalidate *another* CBA (effective 2017-2022) is no basis to overturn the 2016 dismissal of their attempts to invalidate the AFA's *previous* CBA (effective 2015-2017). Finally, the trial court's carefully considered fees and sanctions award does not infringe on any constitutional rights and should be affirmed in full.[11]

[11] Petitioners have not briefed any challenge to the reasonableness of Respondents' mandatory fees pursuant to the TCPA—either on appeal below or in their brief on the merits now—and any such challenge is now waived per Rule 55.2. Further, the record demonstrates that the award was fair and reasonable. *See* CR.2243-2255 (Fees Mot.); CR.2256-2265 (Aff.); CR.2347-2380 (record of fees and costs).

a. TCPA Legal Standard[12]

Analyzing a TCPA motion to dismiss is a two-step, burden-shifting inquiry.[13] First, the movant must show by a preponderance that "the action is based on, relates to, or is in response to the party's exercise of the right of free speech, the right to petition, or the right of association." *ExxonMobil Pipeline Co. v. Coleman*, 464 S.W.3d 841, 845 (Tex. App.—Dallas 2015, pet. filed); TEX. CIV. PRAC. & REM. CODE § 27.005(b). The TCPA defines the "[e]xercise of the right of association" as "a communication between individuals who join together to collectively express, promote, pursue, or defend common interests." TEX. CIV. PRAC. & REM. CODE § 27.001(2).

Second, upon that showing, the burden shifts to plaintiffs; the court "shall dismiss" the complaint unless "the party bringing the legal action establishes by clear and specific evidence a *prima facie* case for each essential element of the claim in question." *Id*. at § 27.005(b), (c). Plaintiffs must "provide enough detail to show the factual basis for its claim." *In re Lipsky*, 460 S.W.3d 579, 591 (Tex. 2015). "[M]ere

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[12] TCPA references are to the version applicable here, in effect prior to the 2019 amendments. *See Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127, 131 n.3 (Tex. 2019).

[13] In the event the plaintiffs are able to carry their responsive burden in the second step, the burden shifts back to the defendants to establish an affirmative defense, if any. *See* TEX. CIV. PRAC. & REM. CODE § 27.005(d). No third step is necessary here.

notice pleading—that is, general allegations that merely recited the elements of a cause of action—will not suffice." *Id*. at 590.

b. AFA Carried Its Initial Burden Under the TCPA

Contrary to the Taxpayer-Petitioners' suggestion, the AFA was not obligated to demonstrate that Petitioners' lawsuit "impaired" the AFA's constitutional rights or that the Petitioners' abuse of the court system arose to an actionable constitutional violation. Rather, to shift the burden to Petitioners, the TCPA required only that the Petitioners' claims "relate" to acts of association, *see* TEX. CIV. PRAC. & REM. CODE § 27.001(2). The AFA readily did so here.

Courts have squarely rejected attempts to read constitutional law into the plain language of the TCPA. *See, e.g.*, *Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 892 (Tex. 2018); *see also Elite Auto Body LLC v. Autocraft Bodywerks, Inc.*, 520 S.W.3d 191, 204 (Tex. App.—Austin 2017, pet. dism'd). Applying the text of the TCPA, the AFA needed only demonstrate that Taxpayer-Petitioners' claims related to "a communication between individuals who join together to collectively express, promote, pursue, or defend common interests." TEX. CIV. PRAC. & REM. CODE § 27.001(2). The Taxpayer-Petitioners' challenge to ABL was based on allegations that it was used for "time spent in Collective Bargaining negotiations; adjusting grievances, attending dispute resolution proceedings, addressing cadet

classes during cadet training . . . , and attending union conferences and meetings." CR.231-233 (TCPA Mot. at 6-8); CR.13 (Pet. at ¶27). This fact alone shifted the burden. *See Combined Law Enforcement Ass'ns of Tex. v. Sheffield*, No. 03-13-00105-CV, 2014 Tex. App. LEXIS 1098, at *17 (Tex. App.—Austin Jan. 31, 2014, pet. denied) (TCPA implicated by emails between members of public employee association).

c. Petitioners Failed to Carry Their Burden Under the TCPA to Demonstrate a Prima Facie Case by Clear and Specific Evidence

With the burden passed to the second stage of the TCPA analysis, Taxpayer-Petitioners were required to "establish[] by clear and specific evidence a prima facie case for each essential element of the claim in question." TEX. CIV. PRAC. & REM. CODE § 27.005(b), (c). Before the court of appeals, Taxpayer-Petitioners cited to no record facts and otherwise entirely failed to argue that they had carried their burden to demonstrate a prima facie case by clear and specific evidence on February 7, 2017. Op. at *15 ("Pulliam and Wiley do not refer to any "clear and specific" evidence that they offered in response to the TCPA motion to establish a prima facie case."). Instead, they relied exclusively on the idea that their failure to establish a prima facie case is "logically incompatible" with the trial court's subsequent rulings—rulings that occurred years later, based on different standards of review, different record evidence, and even different CBAs. As the court of appeals correctly found—as

Taxpayer-Petitioners argued effectively nothing to the contrary—plaintiffs' unsupported allegations were belied by the "undisputed evidence presented at the hearing," and Petitioners failed to carry their prima facie burden. Op. at *16.

Under the TCPA, a nonmovant's burden to present a "prima facie case 'refers to evidence sufficient as a matter of law to establish a given fact if it is not rebutted or contradicted.'" *Long Canyon Phase II & III Homeowners Ass'n v. Cashion*, 517 S.W.3d 212, 222 (Tex. App.—Austin 2017, no pet.) (citations omitted). "Conclusory statements and bare, baseless opinions are not probative and accordingly do not establish a prima facie case." *Id*. That a plea to the jurisdiction—which Taxpayer-Petitioners opposed as "procedurally defective"—was denied does not establish that the trial court found a prima facie case present. Likewise, whether a prima facie burden could be carried years later at summary judgment after discovery bears no logical inconsistency. That ruling was based on a new set of pleadings, challenging a new CBA, after multiple depositions, and after full written discovery including documents created and events that occurred after the TCPA ruling. Subsequent rulings in no way establish that Taxpayer-Petitioners carried their burden under the TCPA in 2017.

In fact, the hearing transcript reveals that the trial court's TCPA dismissal was legally sound. Undisputed evidence established that the CBA—and the ABL

provision itself—was supported by valid consideration, served a public purpose, and afforded a clear public benefit in return. No witness testified to the contrary. Not only did the CBA reflect bargained-for consideration on both sides, but that—as set out in more detail above—the ABL provision itself had involved a specific "give and take" at the bargaining table. 3.RR.21-22; Op. at *16 (noting same). The record also demonstrated that activities performed on ABL served predominantly public purposes. *See, e.g.*, 3.RR.17 (ABL used to "get ideas what's going on in the work place that might lead to discussions that enhance safety"); 3.RR.17-18 (AFA members would "meet to try to come up with solutions that meet management's interest of trying to put bodies in seats, but meet our interest to make sure fatigue and safety issues are addressed"); Op. at *16 (noting same). The record established that the City had authority to reject ABL requests and that, even on ABL, Chief Nicks and other members were subject to City policies and orders. 3.RR.57; CR.19-115, 2015-2017 CBA, at Art. 10, §§ 1(C), (D) at §§ 2(A), (D); *see also* 3.RR.26, 40-42 (describing application of code of conduct and other controls on ABL use); Op. at *16 (noting same).

Even if this unrebutted evidence of consideration, public benefit, and control over ABL were insufficient, moreover, Article 10 of the parties' Agreement cannot be stripped out and considered in isolation, simply because Petitioners dislike the

term. When the Agreement is considered as a whole, as it must be, there can be no question that Petitioners failed to carry their burden.

That burden lay with Wiley and Pulliam, not the AFA, and Taxpayer-Petitioners' reliance on their unverified and conclusory allegations without marshalling evidence in support of each prima facie element was insufficient to carry that burden in 2017, as it was insufficient later at trial, and on appeal. The Court should affirm the trial court's TCPA ruling as affirmed by the court of appeals.

d. AFA's Intervention to Defend Against Petitioners' Amended Petition Seeking to Invalidate the 2017-2022 CBA Does Not Conflict with the Dismissal of Petitioners' Challenge to the 2015-2017 CBA

Taxpayer-Petitioners next argue that the only remedy afforded by the TCPA is an "exit" from the case as the plaintiffs proceed to obtain a judgment in absentia against their defenseless target. As Taxpayer-Petitioners argue, because the AFA obtained a dismissal of the challenge to the 2015-2017 CBA, the AFA should be precluded from defending against a *subsequent* challenge to the *subsequent*, 2017-2022 CBA, merely because it bears the same case number.

In fact, the TCPA provides expedited dismissal of "legal actions" and "lawsuits," not parties. *See, e.g.*, *Montelongo v. Abrea*, 622 S.W.3d 290, 300 (Tex. 2021) (TCPA promotes expedited dismissal of "legal action" meaning not only "lawsuits, petitions, pleadings, and filings, but also causes of action, cross-claims,

and counterclaims"); *D Magazine Partners, L.P. v. Rosenthal*, 529 S.W.3d 429, 434 (Tex. 2017) (dismissal of "legal action"); *Sullivan v. Abraham*, 488 S.W.3d 294, 295 (Tex. 2016) ("expedited dismissal of a legal action"); *In re Lipsky*, 460 S.W.3d 579, 589 (Tex. 2015) ("identify[ing] and summarily dispos[ing] of lawsuits"); *Cavin v. Abbott*, 545 S.W.3d 47, 55 & n.16 (Tex. App.—Austin 2017, no pet.) ("identify[ing] and summarily dispos[ing] of lawsuits").

Taxpayer-Petitioners cannot ignore that their Amended Petition (still pleaded against the AFA) sought to invalidate a separate and distinct CBA. *See* CR.1415 (Am. Pet.) (attaching the CBA ratified September 28, 2017, and in effect through September 30, 2022); *id*. at 1420 (seeking, among other things, to "[p]reliminarily and permanently enjoin Article 10 of the Agreement between AFA and Austin from having any further or continuing effect"). The AFA's efforts to defend against Taxpayer-Petitioners' attempts to invalidate the AFA's new CBA demonstrates no inconsistency or flaw in the 2017 TCPA ruling, and the Court should reject Taxpayer-Petitioners' argument on this point as well.

e. Taxpayer-Petitioners Have Failed to Establish the TCPA Sanctions Award Constituted an Abuse of Discretion by the Trial Court

Under the TCPA, sanctions in an amount sufficient to deter future meritless lawsuits against public policy are statutorily required. TEX. CIV. PRAC. & REM. CODE § 27.009(a).

Taxpayer-Petitioners Pulliam and Wiley each admitted that they had not even *read* the CBA prior to filing suit. *See* CR.3371-84 (Notice and Nobile Decl.); CR.3419-20 (Pulliam); CR.3436 (Wiley). At deposition, Wiley admitted he *still* had never read it or looked into how it was negotiated. CR.3436 (Wiley). Given Taxpayer-Petitioners' failure to do even the most basic of research before affirmatively alleging to the trial court that terms of those CBAs were granted for "nothing in return," Taxpayer-Petitioners showed they were willing to file politically expedient suits regardless of their merits.

Meanwhile, Taxpayer-Petitioners both admitted to having ulterior motives for filing suit against the AFA. Pulliam testified that he "practiced labor and employment laws for many years and ha[s] written about public employee bargaining. I'm not a big fan of public employee bargaining." CR.3422 (Pulliam). He further admitted that "as a matter of public policy I do not believe that public employee bargaining is beneficial to taxpayers or to, to democracy for that matter." CR.3423 (Pulliam). Tellingly, Pulliam also admitted to writing about "lawfare," the practice of "pursuing a political goal through the legal system, either criminally or civilly, by, you know, indirectly accomplishing a particular end." CR.3424.

Taxpayer-Petitioner Wiley admitted to using the lawsuit as publicity to support his political platform. CR.3435, 3446-52. Fewer than ten days after the suit

was filed, Wiley sent an email blast about the suit to his political listserv of about 9,000 to 10,000 individuals, including the press. CR.3440-45, 3448 (Wiley); CR.3458-60 (Sept. 13, 2016 Email from J. Wiley). The email contained a graphic of a "little thief running away with a bag of money," which he selected himself. CR.3443 (Wiley). Wiley also admitted to including information about the lawsuit on his campaign website when he first announced his candidacy. CR.3446-47 (Wiley).

The publicity campaign worked: Wiley's listserv grew at least 20% after filing the lawsuit. CR.3444-45 (Wiley). Wiley admitted publicizing his lawsuit because he "thought it would help [him] in [his] campaign." CR.3448 (Wiley). Likewise, the purpose of his campaign webpage, which featured the lawsuit prominently, was "to promote [his] political campaign." CR.3450 (Wiley).

Although he stated publicly that his purpose in bringing the suit was to ensure that "our tax dollars will no longer be used for private union activities," Wiley also recognized that the City has been forced to expend taxpayer funds to defend that suit, which he continued to press for years after dismissal on the merits of his claim. CR.3443-44 (Wiley).

Given the foregoing, the trial court was justified in concluding that there was a substantial risk that Wiley or Pulliam would file similar abusive, politically-motivated lawsuits against public employee associations in Texas. Indeed, even after

Taxpayer-Petitioners' claims against the AFA had been dismissed on the merits, subjecting Wiley and Pulliam to statutorily-mandated fees and sanctions, Pulliam admitted that "it's possible" that he would file a similar lawsuit in San Antonio if he became a taxpayer there. CR.3425-27 (Pulliam).

Accordingly, the trial court had sufficient grounds to conclude substantial monetary sanctions were necessary to deter similar abusive litigation—filed with ulterior political fundraising and publicity-related motives without a remotely adequate investigation into the underlying facts of the claim—in the future.

f. Taxpayer-Petitioners' Meritless Lawsuit Against Public Policy Warrants No Special Protections from Consequences

Taxpayer-Petitioners, having failed in their attempt to undermine fire fighters' constitutionally protected rights to association, now argue that it is *their* right to associate that has been "implicated" by the sanctions order. But having had their day in court—in fact having had multiple days in court over the course of years—Taxpayer-Petitioners' claims have been adjudicated meritless several times over. While the First Amendment may insulate public-interest attorneys from blanket rules against barratry that would impair public-interest litigants' access to attorneys, that is far from the circumstance here.

In *NAACP v. Button*, 371 U.S. 415 (1963), the Supreme Court was careful to distinguish its holding from the "different matter" of "oppressive, malicious, or

avaricious use of the legal process for purely private gain." *Id*. at 443. The Court noted the judicial hostility towards stirring up litigation "where it promotes the use of legal machinery to oppress," and that "[f]or a member of the bar to participate, directly or through intermediaries, in such misuses of the legal process is conduct traditionally condemned as injurious to the public." *Id*. at 441.

Misuse of the judicial process for purposes of oppression is precisely the kind of conduct the TCPA was designed to prevent. "The TCPA's express purpose is to balance the protections for persons exercising their constitutional rights of expression and association with protections for persons filing meritorious lawsuits for demonstrable injury." *Mem'l Hermann Health Sys. v. Khalil*, No. 01-16-00512-CV, 2017 Tex. App. LEXIS 7474, at *41-43 (Tex. App.—Houston [1st Dist.] Aug. 8, 2017, pet. denied). The balance struck by the TCPA differs from the blanket prohibition on "barratry" at issue in *NAACP v. Button* in several important respects.

As one Texas Appellate Court reasoned when rejecting a challenge to the TCPA under the Texas Constitution, "the fee-award provision is not imposed on a party before being permitted to institute litigation. Nor is it imposed on parties who meet the burden placed on them, under the TCPA, . . . to avoid dismissal." *Id*. Rather, "it is a fee imposed after resolution of a motion to dismiss that shifts litigation costs from the prevailing party (who met its burden to show by a preponderance of the

evidence that the legal action is based on, related to, or is in response to that party's exercise of protected rights) to the party that failed to meet its burden." *Id*. The TCPA has several "provisions in place that limit the impact of this fee-shifting provision," including court discretion to set the amount of fees and sanctions awarded and providing a "countermeasure that permits fee-shifting in the event a trial court finds that a motion to dismiss was frivolous or filed solely to delay." *Id*. Balancing the TCPA's purpose against litigants' protected rights to open court, as well as the right to sue for reputational torts protected by Article I, section 8 of the Texas Constitution, the court nevertheless upheld the TCPA. *Id*. at 43 n.9.

The reasonable attorneys' fees and sanctions imposed against Taxpayer-Petitioners Wiley and Pulliam for their oppressive use of the court system do not offend the constitutional right to associate with counsel, nor do they impair access to the courts, and this Court should reject Taxpayer-Petitioners' constitutional challenge to the pre-2019 TCPA, dismiss the Petition, and affirm the courts' rulings below.

CONCLUSION & PRAYER

The Petition should be rejected and this Court should affirm the rulings below on all issues.

DATE: October 27, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the word count limit contained in TEX. R. APP. P. 9.4(i)(2)(B) because it contains 14,930 words.

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing brief has been served via email on this 27th day of October, 2023, on all parties, or their attorneys of record, as follows:

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Associated Case Party: City of Austin

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