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SUPREME COURT OF TEXAS
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No. 22-1149

IN THE SUPREME COURT OF TEXAS

ROGER BORGELT, MARK PULLIAM, JAY WILEY, 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.

OPPOSITION TO PETITION FOR REVIEW

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SUPPLEMENTAL STATEMENT OF THE CASE

Nature of the Case[1]

This appeal arises from a judgment against the Petitioners, following a two-day trial, at which the Petitioners failed to establish that certain bargained-for terms of the Austin Fire Department's ("AFD") and Austin Firefighters Association's ("Association" or "AFA") Collective Bargaining Agreement ("CBA") were unconstitutional "gifts." *See* Tex. Const., art. III, §§ 50-51, 52(a); *id.*, art. XVI, § 6(a) (collectively, "Gift Clause"). Specifically, Petitioners challenged the constitutionality of the CBA provision in which the City agreed to provide a shared pool of leave for "Association Business Leave," to be used by Austin fire fighters for activities directly supporting the Fire Department's or the Association's missions, subject to numerous rules, restrictions, and approval requirements. Petitioners asserted, but failed to substantiate at trial or on appeal, that the terms of the agreement constituted a "gift" of public funds.

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[1] Respondents offer the above supplement to the "Nature of the Case" but do not object to the remaining subsections of the Petitioners' "Statement of the Case."

STATEMENT OF JURISDICTION

For the reasons stated herein, Respondents contend that this Court should not exercise jurisdiction over this appeal. As the Petitioners assert, this Court possesses jurisdiction over "question[s] of law that [are] important to the jurisprudence of the state." Tex. Gov't Code § 22.001(a). However, no such issues are presented by this appeal. Contrary to the Petitioners' misleading presentation, the appellate court below correctly applied the "Gift Clause" standard, finding all elements of the test satisfied by the trial court's uncontested factual findings. Moreover, the Petitioners' challenge to the Texas Citizens' Participation Act ruling is not only meritless, but it concerns only the application of a law that has not been in force in Texas for nearly four years. Therefore, the Petitioners fail to present any issue of importance to the jurisprudence of the state and, for the reasons stated herein, this Court should not exercise jurisdiction over this appeal.

ISSUES PRESENTED

Respondents submit that the issues presented stated by the Petitioners 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 Respondents' Gift Clause challenge, based on findings of fact that Respondents 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 6.)

STATEMENT OF FACTS

Petitioners have severely misstated the facts of this case, outright ignoring the record evidence and trial court's factual findings, as highlighted in the appellate court's well-reasoned opinion denying Petitioners' appeal.

a. It is Undisputed that the Agreement, Including the ABL Provision, Constitutes an Exchange of Bargained-for Consideration

The Collective Bargaining Agreement ("Agreement" or "CBA") at issue was ratified, after arms-length negotiations between the City's and the Association's negotiation teams, on September 28, 2017, and it is binding on the City, the City's fire fighters, and their employee association ("AFA" or "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").[2] Within the Agreement, Article 10 provides for a pool of Association Business Leave ("ABL") that can be used by the City's fire fighters under certain conditions. RR.5-109 (Joint Ex. 1) (2017-2022 CBA); 4.RR.134:21-

[2] 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 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.

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.").

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.

The trial court record abounds with examples of sufficient consideration for the pool of Association Business Leave ("ABL"), over and above the fire protection and emergency response services provided. For example, the appellate court highlighted the unchallenged factual findings that, in the Agreement that provided ABL, the Association 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 Fire Department with Travis County Emergency Services District." Op. at 6.

Petitioners also failed to challenge, as the appellate court noted, factual findings concerning other benefits the City received under the Agreement, including that the City benefits: (1) from "achieving and maintaining harmonious relations between public safety employees and local government"; (2) from "[a]greeing to a method of equitable and orderly adjustment of firefighter grievances, as described in the Agreement"; and (3) because good labor relations, including "a duly negotiated and ratified labor agreement, are integral in [the City's Fire Department] achieving its purpose, mission, vision, goals and core values." Op. at 7.

The appellate court further noted the uncontroverted evidence that, when the City first agreed to provide 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," with value to 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 ABL, Serves a Predominantly Public Purpose and Affords a Clear Public Benefit in Return

As the trial court found, and the Petitioners failed to challenge on appeal, 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, 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' 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 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").

The same is true for the ABL used by AFA President Bob Nicks. *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 (meetings 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).

Record evidence also supported the conclusion that Chief Nicks' use of ABL improved AFD operations by facilitating open communication with 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").

Record evidence also supported the conclusion that Chief Nicks spent time on ABL in direct support of critical public service missions, 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 a "warming shelter at our Union hall, a 40-bed shelter, and then we started realizing water is an issue, so we started water delivery services," which continued for a "couple-week period").

Despite the Petitioners' assertion that Chief Nicks used ABL for "lobbying activities," *see* Pet. at 3, the record reflects that Chief Nicks testified repeatedly, in deposition and at trial, that he does not use ABL hours for political activities like lobbying. *See, e.g.*, 3.SCR.338-39 (Nicks); 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, ..."); 5.RR.101:11-17 (Nicks) (ABL not used for political purposes)); 5.RR.150:3-151:11 (Nicks) (same);

5.RR.152:5-20 (Nicks) (same); 5.RR.174:16-174:22 (Nicks) (same); *see also* CR.4212 (factual finding that "In addition to his time on ABL, [Nicks] estimates that he spends many hours more per week performing work as AFA President, while not on ABL.")

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

As the trial court found and the record below amply supports, Chief Nicks, as an AFD employee, remained subject to sufficient controls by the City at all times using ABL. In support of their petition, however, Petitioners present a series of misleading assertions understating the degree of the City's control over Chief Nicks, whom Petitioners admit remained a City employee at all times. *See* Op. at 10 n.7 (prior to trial, Petitioners jointly stipulated "[t]he [Association's] President is Bob Nicks, who is employed as a full-time City of Austin firefighter"); 7.RR.451 (Am. Joint Stipulated Facts) at ¶18.

Petitioners erroneously assert that "[n]o one at the City directs [Chief Nicks'] activities, nor does the City place any prohibitions on his activities." Pet. at 2. In fact, as the trial court found and Petitioners failed to challenge, Chief Nicks 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.").[3]

Petitioners also assert Chief Nicks "is not required to report to Fire Department Headquarters or any other City office, on a regular basis." Pet. at 2. In fact, however, the trial court found (and Petitioners failed to challenge) that Chief Nicks had regular meetings with management; as Chief Nicks testified, he meets with management, including his direct supervisor, the Chief of Staff, "[w]henever he asks me to." Op. at 10; CR.4211-12 (Am. FOF & COL) at ¶36; 3.SCR.372, 386-

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[3] *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").

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 Dodds, recurring monthly meetings and others "as-needed").

Petitioners also assert incorrectly that the City "has no say in who becomes the AFA President (or any other Authorized Association Representative) and cannot remove Nicks from his job." Pet. at 3. In fact, as the appellate court 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, 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).

d. The City Retains Sufficient Control Over Other AFA Members Using ABL

The terms of the Agreement limit other AFA members' use of ABL to time spent bargaining collectively, 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).

Contrary to Petitioners' mischaracterizations of the record, ABL use requests are subject to a detailed review process. A fire fighter requesting ABL submits a request to AFD at least three days in advance; this request is reviewed and then either approved or disapproved by the Fire Chief's designee based on compliance with the terms of the CBA and operational needs. *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 amount of ABL usage, and a detailed "Purpose of Request" field. 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 can be denied by AFD management. *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.").

Although Petitioners baselessly assert otherwise, *see* Pet. at 4, the City possesses 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 entered, but it also requires detailed "Purpose of Request" information to be submitted; if ever that information is not submitted, the 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. *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").[4]

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 its use 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* 3.SCR.265 (Woolverton); 3.SCR.342 (Nicks) (ABL for Battle of the Badges event denied); 5.RR.155:25-156:7 (Nicks) ("[O]nce it goes to the approval process, I don't recall a time when anybody has ever said [ABL]'s been used inappropriately, no."); 5.RR.160:12-161:11 (Nicks) (denial "where the operational needs of the Department

[4] 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 in electronic file).

kind of trumped the – you know, the approval of ABL"); 4.RR.113:13-114:14 (Woolverton) (denial of ABL for political rally).

SUMMARY OF ARGUMENT

Petitioners' appeal—just like the arguments they raised unsuccessfully in the courts below and in lawsuits challenging similar leave provisions in Arizona and New Jersey that were rejected by those two jurisdictions' high courts[5]—relies on assertions of fact that simply cannot be reconciled with the record.

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

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

during the years-long course of this litigation, and the trial court's rulings, as affirmed by the appellate court, should be allowed to stand.

ARGUMENT

Association Business Leave ("ABL") is provided as part of an arm's-length agreement, in exchange for valid consideration. Furthermore, the appellate court correctly applied the law in determining that the Agreement, as well as the ABL provision contained within, serves a predominantly public purpose and affords a clear benefit to the community in return, subject to sufficient controls to ensure the City's investment is protected. Therefore, this Court should deny Petitioners' request for review and allow the proceedings below to remain undisturbed.

I. The Petition Should be Denied

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. This 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 lacking.

b. The Courts Below Correctly Applied All Elements of the Gift Clause Standard

The trial court, as affirmed by the Third 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; *Walker*, 86 S.W.3d at 260 (disposing gift clause challenge on presence of consideration alone). Petitioners now seek to escape the trial court's well-grounded

conclusions by, in addition to ignoring the trial record, undoing basic precepts of contract law: arbitrarily ignoring the majority of the CBA and insisting that each party must share a balanced mutuality of obligation on each individual term of the contract.

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. The law of this state is clear. "As a rule, parties have the right to contract as they see fit as long as their agreement does not violate the law or public policy. Parties are bound by the terms of their agreement as written, and this court cannot rewrite the agreement to change its terms." *Morales v. Hidalgo Cnty. Irrigation Dist. No. 6*, No. 13-14-00205-CV, 2015 Tex. App. LEXIS 9919, *7 (Tex. App.—Corpus Christi Sept. 24, 2015, pet. denied) (quotation marks and citations omitted) (payment amounting to 5 years of wages for less than 2 years of work sufficient consideration).

Texas courts have consistently held performance of employment duties to be sufficient consideration for benefits and other compensation provided by a public employer. *See id.*; *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).

But even if the leave available to current City employees was not considered part of the compensation they receive for employment, the trial record boasts myriad, uncontested examples of consideration in other forms. *See* supra, pp. 1-3. No matter the outcome of Petitioners' argument about whether ABL is compensation for employment, therefore, the outcome of this appeal will be no different.

Further, even if the presence of valid consideration were not enough to resolve Petitioners' appeal, Petitioners have nevertheless failed to establish a constitutional violation. Under the *Texas Municipal League* test—all elements of which were applied by the appellate court—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). 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).

On these points, the trial court's conclusions were correct: the CBA negotiated between the City of Austin and its fire fighters 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's operations and personnel—and even over the administration of ABL itself—to protect its investment. *See* supra, pp. 7-12. Petitioners' arguments to the contrary rely on specious misstatements of the record and ask this Court to ignore the lower court's well-supported factual findings—which Petitioners failed entirely to challenge on appeal—and substitute the Petitioners' preferred account of the facts. *See* supra, pp. 7-12. This is not a proper basis to grant an appeal.

c. The TCPA Ruling Provides No Better Reason to Grant Review[6]

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

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[6] The City and its Manager did not move for dismissal of Petitioners' case under the TCPA, nor were they awarded any attorneys' fees or sanctions against the Petitioners. For this reason, the City and its Manager take no position on this argument.

summary judgment. *See* Pet. at 15; Op. at 15-20. 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). There is nothing in the TCPA ruling, based on the narrow factual record at issue in 2017, "inherently contradictory" 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.

Petitioners also misstate the factual record again by claiming "there was no evidence in the record to support a finding that such a punitive sanction amount was necessary for deterrence." Pet. at 17. As the appellate court correctly recited, the record contained evidence that the two individual plaintiffs at the time (Borgelt had not yet been asked to join the suit to replace Pulliam and Wiley, who had left the jurisdiction) had not so much as read the Agreement they were challenging in their lawsuit, that they had never attempted to research the substance of the negotiations, that they used their lawsuit for personal political advantage and fundraising efforts, and that they were not personally responsible for paying any attorneys' fees. Op. at 18. These and the other record facts presented by Respondents appeal amply supported the sanctions awarded.

Finally, even if these questions would normally present issues warranting appeal to this Court, they certainly do not do so now, when the statute at issue has been amended significantly and the standard applicable to the ruling below no longer will be at issue in any future cases. *See* Texas Citizens Participation Act, 86th Leg., R.S., ch. 378, §§ 11-12, 2019 Tex. Gen. Laws 684, 687 (providing that amendments apply to actions filed on or after September 1, 2019).

CONCLUSION & PRAYER

Petitioners' request for review, for the reasons stated above, should be denied, and the trial court's rulings should not be disturbed.

DATE: May 15, 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)(D) because it contains 4,478 words.

/s/ Diana J. Nobile

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