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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.

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

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

BRIEF OF *AMICUS CURIAE* LIBERTY JUSTICE CENTER IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

The Liberty Justice Center is a nonprofit, nonpartisan public-interest litigation firm that pursues strategic, precedent-setting litigation to protect constitutional rights and revitalize constitutional restraints on government power.

This case is of particular interest to LJC because it involves an attempt to circumvent the Supreme Court's ruling in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), in which LJC represented Petitioner Mark Janus. *Janus* held that the First Amendment forbids governments from compelling employees who are not union members to subsidize union political speech through mandatory fees. *Id.* at 2486. Here, the City of Austin and the Austin Firefighters Association (the "Union") effectively seek to accomplish the same thing by diverting firefighters' compensation to fund the Union through release time. LJC submits this *amicus* brief to highlight how the Union's arguments reveal that release time violates the First Amendment principles articulated in *Janus* and serve only private ends, not a public purpose.[1]

[1] In accordance with Texas Rule of Appellate Procedure 11(c), *Amicus* confirms that it is the sole source of fees used to prepare this brief.

STATEMENT OF THE CASE

LJC adopts incorporates by reference the Statement of the Case that Petitioners Roger Borgelt, Mark Pulliam, and Jay Wiley provided.

STATEMENT OF JURISDICTION

LJC adopts incorporates by reference the Statement of Jurisdiction that Petitioners Roger Borgelt, Mark Pulliam, and Jay Wiley provided.

ISSUES PRESENTED

LJC adopts incorporates by reference the Statement of the Case that Petitioners Roger Borgelt, Mark Pulliam, and Jay Wiley provided.

STATEMENT OF FACTS

LJC adopts incorporates by reference the Statement of the Case that Petitioners Roger Borgelt, Mark Pulliam, and Jay Wiley provided.

SUMMARY OF THE ARGUMENT

The Liberty Justice Center submits this *amicus* brief to emphasize that release time violates not only the Gift Clause but also the First

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Amicus certifies under Texas Rule of Appellate Procedure Rule 11(d) that copies have been served on all parties.

Amendment, and that release time serves private interests rather than any public purpose.

In *Janus*, the Supreme Court held that mandatory public-sector union fees violate the First Amendment because they force employees who are not union members to subsidize a private organization's political speech. The Court recognized that a public-sector union's activities—especially including its collective bargaining—are inherently political because the union advocates for the government to take particular actions on matters of public concern.

The release time challenged here forces employees who are not union members to subsidize a union's political speech. The Union has attempted to justify release time as part of employee "compensation," but in fact release time does not compensate employees who are not members of the Union. To the contrary, release time comes at nonmember employees' *expense* by diverting funds that would otherwise be available to compensate them to the Union. Thus, release time forces nonmembers to subsidize a union, just as the forced fees struck down in *Janus* did.

Janus also shows that release time serves no public purpose. The Union uses release time to collectively bargain with the City, which under *Janus* is political lobbying—an activity serving the Union's *private* purposes, not any public purpose. The City receives no clear public benefit from release time because release time is not necessary to achieve "harmonious labor relations," as *Janus* shows. Therefore, release time is nothing more than a handout to a special interest group—precisely what the Gift Clause prohibits.

ARGUMENT

I. Release time forces nonmembers to subsidize the Union and therefore violates the First Amendment under *Janus*.

In defending release time as a form of employee "compensation," the Union has acknowledged that release time forces employees who are not Union members to subsidize the Union: employees give up compensation that they would otherwise receive directly so the Union can receive money for its own activities. This violates the First Amendment under *Janus*, which held that government cannot compel employees who are not union members to subsidize a union.

A. The First Amendment prohibits the government and public-sector unions from requiring nonmembers to pay union fees.

The U.S. Supreme Court has held that the government and public-sector unions violate the First Amendment when they require public employees to financially support a union. *Janus*, 138 S. Ct. at 2486. Accordingly, the Court in *Janus* struck down Illinois's scheme that forced employees who were not union members to pay agency fees to a union as a condition of their employment. *Id.* at 2465, 2486.

The Court explained that compelled speech restrictions cause even more "damage" than restrictions requiring silence because they coerce individuals into "betraying their convictions." *Id.* at 2464. And "[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning." *Id.* The Court then reasoned that "[c]ompelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns." *Id.* The Court then quoted Thomas Jefferson's famous saying that "'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical.'" *Id.* (quoting A Bill for Establishing Religious Freedom, in 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950)).

Accordingly, the Court reasoned that mandatory public-sector fees inevitably compel employees to subsidize a union's political speech and therefore demand exacting First Amendment scrutiny at least. *Id.* at 2483. Under exacting scrutiny, "a compelled subsidy must 'serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Id.* at 2465

The Court recognized that public-sector collective bargaining is inherently political because it entails advocacy on matters of public concern. For example, collective bargaining over public employees' wages impacts the government's budget. *Id.* The Court observed that the union in *Janus* had advocated "tax increases" to give state employees a raise, that teachers unions advocate for "tenure protection," and that unions often use public-sector collective bargaining to voice opinions "on sensitive political topics," such as "climate change, the Confederacy, sexual orientation and gender identity, evolution, and minority religions." *Id.* at 2475-76 (internal footnotes omitted); *see also Harris v. Quinn*, 573 U.S. 616, 636-37 (2014) (explaining that public-sector collective bargaining is "directed at the government" and that, "[i]n the public sector, core [collective-

bargaining] issues such as wages, pensions, and benefits are important political issues").

Janus rejected the argument that mandatory fees were necessary to serve the state's interest in achieving "labor peace," as the Court had held in *Abood v. Detroit Board of Education*. *Id.* at 2466 (citing 431 U.S. 209 (1977)). "By 'labor peace,' the *Abood* Court meant avoidance of the conflict and disruption that it envisioned would occur if the employees in a unit were represented by more than one union." *Id.* at 2465. The *Abood* Court had "predicted" that these "'inter-union rivalries' would foster "dissension within the work force," and the employer could face "conflicting demands from different unions." *Id.* (quoting 431 U.S. at 220-21). *Janus* rejected *Abood's* reasoning because of evidence in Right to Work states such as Texas, where unions and management collectively bargain and achieve labor peace even without forced fees. *Id.* at 2466; *see also* Tex. Labor Code Ann. § 101.503.

The Court therefore concluded that mandatory public-sector union fees could not survive exacting scrutiny. *Janus*, 138 S. Ct. at 2466. Because the government can serve its interest in labor peace without

infringing on employees' First Amendment right *not* to pay for an organization's political speech, it must do so. *Id.*

B. Release time requires nonmembers to subsidize the Union and it therefore violates the First Amendment.

These principles show that the release time challenged here violates not only the Gift Clause of the Texas Constitution, as Petitioners argue, but also the First Amendment.

The City has argued that release time is not a "gift" because it is a form of employee "compensation." *Borgelt v. Austin Firefighters Ass'n, IAFF Local 975*, No. 03-21-00227-CV, 2022 Tex. App. LEXIS 8577, at *19 (Tex. App.—Austin, Nov. 22, 2022). And the City supports this point by acknowledging that the City agreed to release time in exchange for the Union's agreement to lower overtime wages for firefighters. *Id.* As the Third Court explained: "the City agreed to the current method of allowing up to 5,600 hours per year of Association Leave in exchange for a change in the treatment of sick leave from 'productive leave' that counted toward employees' hours worked for purposes of calculating overtime to 'nonproductive leave' that did not count towards employees' hours worked." *Id.* at *23. The court noted that "this change saved the

City between $500,000 to $600,000 per year, while the cost of Association Leave is approximately $200,000 per year." *Id.*

This illustrates that release time does *not* compensate employees: in fact, it compensates the *Union* at the *expense* of employees, including employees who do not wish to support the Union. If an employee has chosen not to join the Union—and thus chosen not to pay Union dues—then that employee presumptively does not wish to support the Union financially, directly or indirectly. Yet release time forces the nonmember employee to subsidize the Union anyway: money that could have gone to actual employee compensation (such as the overtime pay the Union sacrificed here) instead goes to the Union to fund Union activities—which, as *Janus* recognized, inevitably predominately include political activities. 138 S. Ct. at 2474-75.

Thus, the Union is using release time to accomplish indirectly what *Janus* forbids it from doing directly. The Court should not tolerate this attempted end run around the First Amendment. *Elrod v. Burns*, 427 U.S. 347, 362 (1976) (discussing how "exacting scrutiny . . . 'is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an

unintended but inevitable result of the government's conduct . . . .'" (quotation omitted)).

II. Release time serves private purposes, not a public purpose.

Janus also shows that release time does not serve a public purpose but instead serves the Union's private purposes.

Release time's predominant purpose is funding a private organization's political lobbying machine, which is not a public purpose. Under the logic of *Janus* and *Harris*, the Union's collective bargaining is political lobbying because it is directed at influencing the decisions of a public-sector employer—i.e., the government.

The Union's president admits that he uses release time to collectively bargain with the City. For example, he testified that he used release time to work on a project with the City to "come up with the most desirable ways from *the Association's membership's point of view* to solve an overtime crisis due to a personnel shortage." *Borgelt*, 2022 Tex. App. LEXIS 8577, at *34 (emphasis added). He claimed that this process saved the City "three to four million dollars and minimize[d] morale issues." *Id.* And the collective bargaining agreement itself says that the Union may use release time for "Collective Bargaining

negotiations[,] adjusting grievances, addressing cadet classes during cadet training (with prior approval of the time and content by the Fire Chief, or his/her designee), and attending union conferences and meetings." *Id.* at *35.

Further, the CBA permits the Union to use release time for lobbying "activities that 'relate to the wages, rates of pay, hours of employment, or conditions of work affecting the members of the bargaining unit' and at the local level 'to raising concerns regarding firefighter safety.'" *Id.* These are exactly the types of activities that *Janus* and *Harris* held were inherently political speech and lobbying—*private* activities on behalf of a *private* interest group.

Indeed, the Union has asserted its rights as a private entity even in this litigation, invoking the Texas Citizens Participation Act against the taxpayers and arguing that this lawsuit's bid to end release time allegedly burdens the Union's freedom of association. *Borgelt*, 2022 Tex. App. LEXIS 8577, at *46-47. Thus, the Union acknowledges that its release-time activities are First Amendment activities.

There is no public benefit from giving the Union release time—i.e., from using taxpayer money to fund the Union's lobbying on its own

behalf. The lower court reasoned that this subsidy "facilitates harmonious labor relations," but *Janus* held that forced subsidies are not needed to achieve "labor peace." Again, the Court pointed to Right to Work states such Texas, where public-sector unions function effectively even without forced fees. *Janus*, 138 S. Ct. at 2466; Tex. Labor Code Ann. § 101.503.

Perhaps gratuitous subsidies could help government officials have more "harmonious relations" with *anyone* who receives them, especially including highly active political lobbying groups, and groups like Unions that are well-positioned to disrupt the provision of public services if they are displeased. But that is not enough to give subsidies for private activities a public purpose. To the contrary, the Gift Clause exists specifically to prevent the government from getting too "harmonious" with special interest groups by doling out gifts like the release time at issue here.

Thus, release time does not serve a public purpose but instead serves the private interests of a private organization.

PRAYER

The petition for review should be granted, and the judgment of the Court of Appeals should be reversed.

March 21, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief contains 2,118 words, excluding the portions of the brief exempted by Rule 9.4(i)(1) of the Texas Rules of Appellate Procedure, which is less than the 4,500 word limit.

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