

Borgelt v. Austin Firefighters Ass'n

Supreme Court of Texas

February 21, 2024, Argued; June 28, 2024, Opinion Delivered

No. 22-1149

Reporter

2024 Tex. LEXIS 549 *; 67 Tex. Sup. J. 1394

Roger Borgelt, Mark Pulliam, Jay Wiley, and the State of Texas, Petitioners, v. Austin Firefighters Association, IAFF Local 975; City of Austin; and Marc A. Ott, in his official capacity as the City Manager of the City of Austin, Respondents

Notice: PUBLICATION STATUS PENDING. CONSULT STATE RULES REGARDING PRECEDENTIAL VALUE.

Prior History: [*1] On Petition for Review from the Court of Appeals for the Third District of Texas.

Borgelt v. Austin Firefighters Ass'n, IAFF Local 975, 684 S.W.3d 819, 2022 Tex. App. LEXIS 8577 (Tex. App. Austin, Nov. 22, 2022)

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For The State of Texas, Petitioner: Ms. Sara B. Baumgardner, Atty. Gen. W. Kenneth Paxton Jr., Mr. William Thompson, Mr. David J. Hacker, Mr. Ryan L. Bangert, Mr. Brent Webster, Austin R. Nimocks, Mr. Brantley David Starr, Mr. Prerak Shah, Mr. Andrew D. Leonie III, Mr. Patrick K. Sweeten, Mr. James E. Davis, Mr. Judd Stone II, Mr. Jeffrey C. Mateer, The Honorable Michael C. Toth, Mr. Joel Stonedale, Mr. John B. Scott, Ms. Lanora C. Pettit.

For Roger Borgelt, Petitioner: Ms. Munera Al-Fuhaid, Mr. Chance D. Weldon, Mr. Jonathan Riches, Mr. Matthew R. Miller, Mr. Robert E. Henneke.

For Cato Institute, Amicus Curiae: Mr. Nicholas DeBenedetto, Mr. Tony K. McDonald, Mr. Isaiah McKinney.

For Mark Pulliam, Jay Wiley, Petitioners: Mr. Chance D. Weldon, Mr. Robert E. Henneke, Mr. Jonathan Riches, Ms. Munera Al-Fuhaid.

For National Right to Work Legal Defense Foundation, Inc., Amicus Curiae: Mr. William L. Messenger, Mr. David Watkins.

For Liberty Justice Center, Amicus Curiae: [*2] Mr. Jacob Huebert, Mr. Jeffrey Jennings.

For Mountain States Legal Foundation, Amicus Curiae: Mr. Joseph Bingham.

For Marc A. Ott, in his Official Capacity as the City Manager of the City of Austin, City of Austin, Respondents: Ms. Anne L. Morgan, Ms. Meghan L. Riley, Mr. Paul Matula.

For Freedom Foundation, Amicus Curiae: Timothy Snowball, Shella Alcabes.

Judges: JUSTICE YOUNG delivered the opinion of the Court, in which Chief Justice Hecht, Justice Lehrmann, Justice Blacklock, Justice Bland, and Justice Huddle joined. JUSTICE BUSBY filed an opinion dissenting in part and concurring in the judgment in part, in which Justice Boyd and Justice Devine joined.

Opinion by: Evan A. Young

Opinion

Several "Gift Clauses" of the Texas Constitution prohibit governmental entities from making "gifts" of public resources to private parties. We must decide whether article 10 of the collective-bargaining agreement that governs the relationship between the City of Austin and its firefighters makes such a gift. Petitioners allege that it does—that it impermissibly benefits the Austin Firefighters Association, the union that represents firefighters and that negotiated the agreement with the City. Article 10 grants 5,600 hours of "Association [*3] Business Leave" so that those undertaking various activities may do so using a special category of paid time off. Each year, moreover, the Association's president may use 2,080 of those hours—enough to be on leave essentially all the time. Other firefighters may use the rest. Petitioners contend that this leave time has been misused for improper purposes, which undergirds their theory that article 10 amounts to an

unconstitutional gift to the union.

We do not dispute the seriousness of petitioners' allegations. To the contrary, they are sufficiently weighty that the court of appeals erred by granting relief to the Association under the Texas Citizens Participation Act, including the award of fees and sanctions. But as it comes to us, this case turns on the meaning of the collective-bargaining agreement, which is a governmental contract. Article 10's text and context impose limits on the use of "Association Business Leave" that prohibit the kind of improper uses that petitioners allege. Those contractual limits are essential to avoiding a Gift Clause problem. The challenged conduct that petitioners allege and respondents dispute, in other words, is not authorized by or the necessary fruit of the agreement; it would breach that agreement. [*4] Under ordinary contract-interpretation principles, which the doctrine of constitutional avoidance magnifies because this is a *governmental* contract, we must read the agreement to authorize only lawful conduct. We therefore cannot conclude that article 10 itself violates the Gift Clauses.

This result does not mean that we endorse any conduct that petitioners claim supports their view that article 10 is unconstitutional. We do not suggest that parties may wrap themselves in a contract that is formally constitutional only to regularly engage in the very conduct that their contract forbids. The Gift Clauses would be a dead letter if they could be honored in name yet ignored in practice. The record in this case, however, provides no basis for us to declare an "as implemented" or "as applied" violation of the Gift Clauses, which would require far more than occasional breaches of the agreement. The trial court's findings of fact went unchallenged, and the resulting appeal below and in this Court has focused primarily on whether the agreement itself inescapably violates the Gift Clauses under our precedents. We now resolve that question. But going forward, if the parties to the agreement do not abide by the agreement's terms, there will [*5] be time enough—and soon—for a Gift Clause challenge to be based on a clear record. We assume, however, that the parties will adhere to their agreement.

Accordingly, we affirm the judgment below in part and reverse and render judgment in part.

I

The legislature has determined that the "policy of this state is that fire fighters . . . , 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." Tex. Loc. Gov't Code § 174.002(b). By referendum election, the City's voters have "chosen the Collective Bargaining Process as a fair and orderly way of conducting its relations with Austin Fire Fighters." Since then, the City has executed multiple collective-bargaining agreements.

In 2017, the Association and the City executed the collective-bargaining agreement at issue.¹ The agreement's purpose, as recited in its preamble, is to "achieve and maintain harmonious relations between the parties, and to establish benefits, rates of pay, hours of work, and other terms and conditions of employment for all members of the bargaining unit." The preamble also recites that "the Association has [*6] pledged to support the service and mission of the Austin Fire Department," and "to constructively support the goals and objectives of the Austin Fire Department." The agreement contains thirty-two articles as well as seven appendices. Included, for example, are provisions relating to "Work Furloughs" (article 6), "Association Dues & Payroll Deductions" (article 7), "Wages & Benefits" (article 9), "Hours of Work" (article 14), "Overtime" (article 15), "Investigations & Disciplinary Actions" (article 18), and many more.

Disputed here is article 10, which we attach as an

¹The agreement at issue here became effective in October 2017 but expired in September 2022, subject to thirty-day extensions not to exceed six total months. Petitioners contend and no party disputes that, while the agreement has expired, the case is not moot because the City and the Association executed a new collective-bargaining agreement in 2023 that does not materially vary from the old one. We have not found a copy of the new agreement in the record. At oral argument, Borgelt's counsel represented that he would "get [us] the record citation" for the new agreement, but we have received no supplemental filings. No party contested the representation about the new agreement, however, and we have independently located a copy on the City of Austin's public website. See *Fire Collective Bargaining Agreement*, austintexas.gov, <https://www.austintexas.gov/page/fire-collective-bargaining-agreement> (last visited June 25, 2024). There are some differences between the new and old leave provisions, but, like the parties, we find those differences to be immaterial and thus agree with the parties that the case is not moot. See, e.g., *Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001) ("capable of repetition, yet evading review" doctrine). Our discussion and quotation of the agreement reference the 2017 version that is in our record.

appendix to this opinion. Article 10 is a short provision—it takes up two of the agreement's 105 pages—titled "Association Business Leave." (Like the parties, we surrender to the initialism "ABL" when referring to Association Business Leave.) Under article 10, ABL is "paid time off" during which authorized Association representatives can conduct "Association business activities." Association business is defined in article 10, § 1(B) ("Permitted Uses of ABL"), to include time spent in collective bargaining, adjusting grievances, attending dispute-resolution proceedings, addressing cadet classes, [*7] and attending union conferences and meetings. By contrast, article 10 expressly prohibits using ABL for political activities, with some exceptions that are not relevant here. Article 10 does not require or permit the City to pay any money to the Association; rather, authorized representatives using ABL "receive their ordinary City salaries, benefits, and pensions." These costs, in turn, are funded through the City's budget, primarily by property and sales taxes. The Association does not pay any portion of ABL—that is, it does not reimburse the City for the pay and benefits that the City expends when firefighters use ABL.

Under article 10, the City contributes 5,600 ABL hours each year "to a pool of leave time which may be used in accordance with [article 10]." The Association's president may use 2,080 of those hours, which equates to forty hours a week. The City firefighter designated as the Association president, in other words, can be deemed to be working full time but, during all of it, be on "leave" to conduct Association business activities.

Other authorized Association representatives may use the remaining hours. They need not be union members to do so.² Firefighters cannot use [*8] ABL at will. The parties have stipulated that a "requester cannot use ABL without approval beforehand from the AFA President and the Fire Chief's Designee."³ Article 10's text

²Testimony in the record indicates that firefighters who were not members of the Association have used ABL time. Nothing in the text of article 10 limits its use to union members. Given the construction of article 10 that we describe below, *see infra* Part II.B, ABL time cannot properly be denied to non-union members because of that status. We agree with the State, in other words, that limiting ABL to union members would be problematic, but disagree that the contract allows such a restriction.

³We express no view of whether ABL could be granted even if the Association's leadership did not approve it. Nor need we express any view of the duty imposed on the Association that runs to all firefighters, union members or otherwise, in

requires that the department's fire chief (or designee) "shall approve timely ABL requests, subject only to the operational needs of the Department." (Our subsequent references to the fire chief encompass the chief and the chief's "designee.") According to the record, the department has denied requests for ABL, but only rarely.

Petitioners challenging the ABL provision's constitutionality include Roger Borgelt, an Austin resident and taxpayer, and the State.⁴ They allege that City firefighters have used ABL for improper purposes. For example, they say that the Association president routinely uses ABL for unauthorized political activities like supporting and opposing candidates in elections. They say other authorized Association representatives improperly use ABL hours for "other association business" like "attending private charitable events (e.g., 'a gala,' a boxing match called 'Battle of the Badges,' 'fishing fundraisers') and meetings of the [Association's] 'political action committee.'" According to [*9] petitioners, City firefighters are using taxpayer-funded ABL to benefit themselves or the Association rather than doing the work the City hired them to do: fight fires. ABL allegedly costs the City over \$200,000 a year.

The lawsuit sought a declaration that article 10 is unconstitutional under several of the Texas Constitution's Gift Clauses, *see* Tex. Const. art. III, §§ 50, 51, 52(a); *id.* art. XVI, § 6(a), and an injunction barring article 10 from having any further effect, *see Osborne v. Keith*, 142 Tex. 262, 177 S.W.2d 198, 200 (Tex. 1944) ("This court recognizes the right of a taxpaying citizen to maintain an action in a court of equity to enjoin public officials from expending public funds under a contract that is void or illegal."). The State intervened on behalf of the plaintiffs "to protect the constitutional rights of taxpayers" and "defend the rule of law." It sought the same relief. No party challenges that intervention.

exercising its apparent authority to grant or deny ABL requests.

⁴The court of appeals fairly described this dispute's procedural background, which began in 2016, as "complex." 684 S.W.3d 819, 825 (Tex. App.—Austin 2022). The original plaintiffs were Mark Pulliam and Jay Wiley (also Austin taxpayers), who sued the Association, the City, and the City Manager (all references to the "City" include the City Manager unless otherwise specified) regarding article 10 in a predecessor collective-bargaining agreement. Via amended pleadings, their claims regarding the predecessor agreement carried forward to the 2017 agreement.

The Association moved to dismiss under the Texas Citizens Participation Act. It argued that the lawsuit was "entirely meritless" and would "serve no purpose going forward other than to chill [Association] members' exercise of their right of association." The Association requested dismissal, plus costs, fees, and sanctions.

In early 2017, the trial court granted the Association's motion, dismissed all claims against the Association with prejudice, and ordered [*10] that the Association recover its fees and costs.⁵ Despite being dismissed, the Association intervened back into the litigation to defend article 10's constitutionality, together with the City. In 2018, the Association and the City jointly moved for summary judgment on this issue, as did the taxpayers and the State. The Association separately moved for fees, costs, and sanctions in accordance with the trial court's 2017 order granting the Association's TCPA motion.

In 2019, the trial court partially granted and partially denied the City and the Association's summary-judgment motion. The court granted the motion "as to any claims related to the . . . agreement itself and the terms therein." But the court denied the motion "with regard to the implementation of such contract by the City." The court denied the State and the taxpayers' summary-judgment motion. Finally, the court granted the Association \$115,250 in fees and \$75,000 in sanctions for the TCPA dismissal. Several months later, one of the original plaintiffs, Pulliam, nonsuited his claims against the City. Nearly a year after that, Wiley—now joined by Borgelt, who joined the litigation about four years after it began—filed [*11] a second amended petition against the City. The pleading continued to request the same relief. A few days later, Wiley nonsuited his claims against the City, leaving Borgelt as the only remaining individual plaintiff.⁶

⁵The taxpayers and the State took related interlocutory appeals, both of which were dismissed for want of jurisdiction and have no bearing on our decision. See *Pulliam v. City of Austin*, No. 03-17-00131-CV, 2017 Tex. App. LEXIS 3325, 2017 WL 1404745 (Tex. App.—Austin Apr. 14, 2017, no pet.); *State v. City of Austin*, No. 03-17-00131-CV, 2017 Tex. App. LEXIS 9510, 2017 WL 4582603 (Tex. App.—Austin Oct. 11, 2017, no pet.). Another unrelated interlocutory appeal, which was later dismissed upon unopposed motion, likewise has no bearing on today's decision. See *City of Austin v. Pulliam*, No. 03-18-00306-CV, 2018 Tex. App. LEXIS 5055, 2018 WL 3321197 (Tex. App.—Austin July 6, 2018, no pet.).

⁶Pulliam and Wiley nonetheless remain parties to this appeal to challenge the TCPA fees and sanctions.

The case proceeded to a bench trial in 2021 to determine the constitutionality of the City's implementation of article 10. Finding no constitutional problem, the trial court rendered a final judgment for the City. The judgment ordered that Borgelt and the State take nothing and that their claims against the City be dismissed with prejudice. The court also ordered "that Mark Pulliam and Jay Wiley shall pay the [Association] the amount of \$190,250" for the Association's meritorious TCPA motion.

Upon petitioners' request, the trial court entered findings of fact and conclusions of law. The court did not make any direct findings or conclusions that ABL had been used for improper purposes.⁷ Nor did the court make requested findings that certain allegedly unlawful ABL uses had occurred. The court found that the Austin Fire Department's and the Association's missions "overlap," the "City does not give any public funds to the [Association]," and the agreement "benefits the public in general." [*12] It found that the City "can and do[es] review the written requests for ABL . . . and has denied those requests when they do not comply with [article] 10 . . . or when the requests would interfere with the operational needs of the department." The court concluded that article 10, whether as written or as implemented, does not violate any Gift Clause and "accomplishes a predominantly public purpose and is not predominantly a benefit to private parties."

The court of appeals affirmed. 684 S.W.3d 819 (Tex. App.—Austin 2022). Petitioners did not challenge the trial court's findings of fact. Applying our precedent in *Texas Municipal League Intergovernmental Risk Pool v. Texas Workers' Compensation Commission*, 74 S.W.3d 377 (Tex. 2002), the court concluded that article 10 is not gratuitous, and that the article "(1) serves a legitimate public purpose and (2) affords a clear public benefit received in return." 684 S.W.3d at 833-40. The

⁷Both parties agree that at least some ABL is used for Association business activities like collective bargaining, adjusting grievances, attending dispute resolution proceedings, addressing cadet classes, and attending union conferences and meetings. The trial court, however, made no specific findings regarding ABL usage except for the following: "[The Austin Fire Department] has authorized firefighters' use of ABL to compete in the Fire Fighter Combat Challenge event, which promotes firefighter fitness and furthers the Department's mission of maintaining a healthy and highly performing workforce"; "The [Association] uses ABL for 'other association business' including station visits"; and "The [Association] uses ABL for 'other association business' including organizing and working third-party charity events."

court also upheld the trial court's orders requiring Pulliam and Wiley to pay the Association fees and sanctions under the TCPA. See *id.* at 840-48.

II

Petitioners invoke four provisions of our Constitution, each of which is a Gift Clause. See Tex. Const. art. III, §§ 50, 51, 52(a); *id.* art. XVI, § 6(a). The issue before us is whether article 10 as written violates any of those provisions.⁸ We focus on Article III, § 52(a), which was also the Gift Clause at issue in *Texas Municipal League* and is the parties' primary focus. Counsel for Borgelt, for example, suggested at argument that § 52(a) provides the "clearest [*13] example" of a Gift Clause violation here. No party has argued that any other provision would generate a different outcome, so we assume without deciding that none would.

⁸We focus on this legal issue like the court of appeals did and the parties largely do, but the dissent focuses on something else: whether the historical use of ABL proves that the parties violated article 10 enough that, even if article 10 itself complies with the Gift Clauses, the parties' conduct still violated the Gift Clauses. The dissent repeatedly asserts that one thing or another is "conclusively established" (or "shown" or "demonstrated"). We are not persuaded. To the contrary, we are satisfied that any "as implemented" or "as applied" challenge is unavailing. The dissent asserts facts as "conclusively established" far more than petitioners do; their arguments about article 10's facial unconstitutionality dwarf any contentions about article 10 being unconstitutionally implemented. Petitioners did not challenge the trial court's findings of fact, and—with respect to our colleague—the record makes clear that the parties hotly dispute the core facts. "When findings of fact are filed and are unchallenged, as here, they occupy the same position and are entitled to the same weight as the verdict of a jury." *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 696 (Tex. 1986). "We defer to unchallenged findings of fact that are supported by some evidence." *Tenaska Energy, Inc. v. Ponderosa Pine Energy, LLC*, 437 S.W.3d 518, 523 (Tex. 2014); *cf. Medina v. Zuniga*, 593 S.W.3d 238, 247 (Tex. 2019) ("In reviewing a verdict for legal sufficiency, we must view the evidence in the light favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not." (internal quotation marks omitted)).

Accordingly, even if the dissent cited more snippets from the record than it does, we would still conclude that the facial challenge is the only viable path in this Court. We criticize petitioners for none of this—quite the opposite. Clarifying our Gift Clause jurisprudence as a matter of law is well worthwhile and can inform future cases (if needed).

We accordingly proceed by applying § 52(a), which we also call "the Gift Clause." Its text provides as follows:

Except as otherwise provided by this section, the Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever . . .

Tex. Const. art. III, § 52(a). This Gift Clause was adopted in 1876 and its text has not been materially modified since then.

Although the text refers to the legislature,⁹ all parties here agree that the Gift Clause fully applies not only to legislative enactments but to municipal contracts like the one at issue.¹⁰ They differ only in *how* it applies, and it is that dispute that we resolve. Several points, however, are readily established. First, the Gift Clause prohibits gifts to "association[s]," which the Association is. Next, it forbids the City from "lend[ing] its credit" or "grant[ing] public money or thing of value" to the Association; "public money" at least pays [*14] for ABL time, which itself may be an (intangible) "thing of value." What the parties contest, in essence, is whether article 10 improperly "grant[s]" City money to the Association.

⁹The other cited Article III Gift Clauses likewise textually target legislative exercises of power: "The Legislature shall have no power . . ." See Tex. Const. art. III, §§ 50, 51. Article XVI, § 6(a) addresses "appropriation[s] for private or individual purposes." The City has not disclaimed the applicability of the other Gift Clauses to a municipal contract and so we assume that they apply equally to a city.

Notably, although no party has cited it, our Constitution also contains a Gift Clause specifically relevant to local governments. See Tex. Const. art. XI, § 3 ("No county, city, or other municipal corporation shall hereafter become a subscriber to the capital of any private corporation or association, or make any appropriation or donation to the same, or in anywise loan its credit . . ."); see *City of Cleburne v. Gulf, C. & S.F. Ry. Co.*, 66 Tex. 457, 1 S.W. 342, 342 (1886) ("The object of [art. XI, § 3] was to deprive municipalities of the power possessed by them under the constitution of 1869 in the exercise of which many counties and towns in the state assumed burdens not yet discharged, in anticipation of benefits never realized."). We express no opinion about whether this provision has any meaning that is materially distinct from § 52(a) or the other Gift Clauses that the parties cite.

¹⁰For purposes of this case, therefore, we also assume without deciding that § 52(a) applies to municipal contracts.

We read the constitutional text not in a vacuum but also through the lenses of history and precedent. This Court has long recognized the historical role and context of our Constitution's Gift Clauses, which were not merely abstract enactments to pursue a concept of good government, but also responded to concrete issues. For example, in the nineteenth century, local governments often sought to entice the construction of railroads within their territory by lending their credit to finance construction loans. See *City of Cleburne v. Gulf, C. & S.F. Ry. Co.*, 66 Tex. 457, 1 S.W. 342, 342 (1886) (noting how "many counties and towns . . . assumed burdens not yet discharged, in anticipation of benefits never realized"). Resulting financial problems exposed "gross corruption" in the political system, and as a reaction to these problems, the framers of our 1876 Constitution "frequently cast in extremely restrictive language" the prohibitions on public spending for private purposes. George D. Braden et al., *The Constitution of the State of Texas: An Annotated and Comparative Analysis* 232 (1977). [*15] The Gift Clauses were conceived against the backdrop of these financial and political troubles.¹¹

This general history provides at least some context, and it is conceivable that further analysis of the Gift Clauses' original public meaning—and whether there is any variation from clause to clause—could assist the courts and the public in understanding their contours. The parties here, however, have not identified any such basis for departing from our Gift Clause precedent.

Instead, they have all focused on our decision in *Texas Municipal League*. Consistent with their briefing, petitioners at oral argument represented that this case

¹¹ See generally David E. Pinsky, *State Constitutional Limitations on Public Industrial Financing: An Historical and Economic Approach*, 111 U. Pa. L. Rev. 265, 280 (1963) ("[T]here was practically no public control over the planning of the railroad project or over the actual expenditures of publicly contributed funds. These functions were completely delegated to private corporate officials."). "The experience of the nineteenth century taught that public funds must be subject to public control." Richard M. Jones, *The Future of Moral Obligation Bonds as a Method of Government Finance in Texas*, 54 Tex. L. Rev. 314, 318 (1976); see also Mike Willatt, *Constitutional Restrictions on Use of Public Money and Public Credit*, 38 Tex. B. J. 413, 422 (1975) ("To insure that the political subdivision receives its consideration, viz., accomplishment of the public purpose, the political subdivision must retain some degree of control over the performance of the contract.").

presents a "straightforward application" of that case, which they ask us to apply.¹² Respondents have likewise focused on that case's requirements. *Texas Municipal League* concerned whether state statutes rather than a local contract violated § 52(a),¹³ but it articulated broader principles. Given the parties' positions, we confine ourselves today to applying that precedent here.

Texas Municipal League began with an anti-gratuity requirement. Section 52(a)'s prohibition of granting public money meant, we explained, that the legislature could not lawfully require cities to make "*gratuitous* payments to individuals, associations, or corporations." [*16] 74 S.W.3d at 383. A challenged expenditure (like the ABL time here) cannot escape characterization as an unconstitutional gift without surviving that threshold inquiry. But even if it does, there is more. The Gift Clause "does not prohibit payments" when they satisfy two prongs—first, they must "serve[] a legitimate public purpose," and second, they must "afford[] a clear public benefit received in return." *Id.* The "legitimate public purpose" prong itself splits into a "three-part test," *id.* at 384, several parts of which overlap with both the anti-gratuity requirement and the

¹² The State's merits briefing suggests that lower courts' application of *Texas Municipal League* has begun to conflict with the Gift Clause's original public meaning, but the State's counsel clarified at oral argument that the State is "certainly not advocating that the Court overturn *Texas Municipal League*" itself. Rather, the State explained that the "easiest way for the Court to resolve the Gift Clause question is through a straightforward application of *Texas Municipal League*." Likewise, for example, Borgelt's counsel said this case "is in fact a straightforward application of *Texas Municipal League*."

¹³ *Texas Municipal League* involved an as-applied constitutional challenge to two statutory provisions. See 74 S.W.3d at 379. "A facial challenge claims that a statute, by its terms, always operates unconstitutionally. By contrast, an as-applied challenge asserts that a statute, while generally constitutional, operates unconstitutionally as to the claimant because of her particular circumstances." *Tenet Hosps. Ltd. v. Rivera*, 445 S.W.3d 698, 702 (Tex. 2014). It is unclear whether or to what extent this doctrine applies when challenging a governmental contract as unconstitutional, but in any event, we do not understand petitioners to argue that article 10 operates unconstitutionally as to them because of their "particular circumstances." Rather, their facial challenge argues that article 10 operates unconstitutionally in all circumstances.

"clear public benefit" prong.¹⁴

Without changing *Texas Municipal League's* requirements—something no party asks us to do—we can consolidate its various cumbersome "tests" and "requirements" and "prongs" into three principles. A challenged expenditure satisfies § 52(a)'s Gift Clause when (1) the expenditure is not gratuitous but instead brings a public benefit; (2) the predominant objective is to accomplish a legitimate public purpose, not to provide a benefit to a private party; and (3) the government retains control over the funds to ensure that the public purpose is in fact accomplished. If article 10 meets all three principles—public benefit, public purpose, and public control—then [*17] it does not violate the Gift Clause.¹⁵

We recognize that principles like these are not themselves the constitutional text. They instead usefully reflect how courts can neutrally, predictably, and reliably apply the Constitution's mandate when undertaking the delicate task of assessing the actions of the other branches of our government. Courts must unflinchingly enforce the law, of course. But they must also rigorously distinguish between policy conflicts and legal questions. Under our Constitution, policy choices belong to the other branches, and the judiciary may not second-guess them. Precedents that are faithful to the constitutional text help us, and everyone else, maintain clear lines of demarcation between policy and law. Consistent resolution of cases in light of those precedents, in turn, ensures that the courts' decisions flow from settled rules rather than ad hoc reactions to various governmental actions. That consistency gives the other branches and the public the ability to plan their affairs with greater confidence that they are following the law and that those

¹⁴ Specifically, *Texas Municipal League* articulated the three-part test to satisfy the "legitimate public purpose" prong as: "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." 74 S.W.3d at 384. We treated this third test as automatically satisfied by our analysis of the anti-gratuity requirement, *id.* at 385, and we treated the second ("clear public benefit") prong as largely the same as the first prong's first ("legitimate public purpose") test, *id.*

¹⁵ To be clear, by stating the test in this way, we aim only to eliminate the complexity of how *Texas Municipal League* articulated the test, but disclaim any substantive deviation from its analysis or from the precedents that it cited.

plans, once undertaken, will not be tossed aside inexplicably. As we said in *Texas Municipal League*, therefore, we "presume" that legislative bodies [*18] intend their acts "to comply with the United States and Texas Constitutions, to achieve a just and reasonable result, and to advance a public rather than a private interest." 74 S.W.3d at 381. "The burden is on the party attacking [the expenditure] to show that it is unconstitutional." *Id.*

With this starting point, we examine in turn the three principles drawn from our Gift Clause jurisprudence.

A

We begin with whether article 10 is a "gratuitous" transfer or one that brings a "public benefit." As we explained in *Texas Municipal League*, "[a] political subdivision's paying public money is not 'gratuitous' if the political subdivision receives return consideration." *Id.* at 383. There need be "only sufficient—not equal—return consideration to render a political subdivision's paying public funds constitutional." *Id.* at 384. Viewed as a whole, the collective-bargaining agreement satisfies this requirement. The agreement was negotiated to establish benefits, wages, hours, and other employment terms and conditions for City firefighters who, in exchange, agree to abide by those terms and conditions in providing firefighting services to the City, including risking their lives for the public. The agreement is not remotely so one-sided that anyone could perceive a failure [*19] of consideration.

Petitioners ask us, however, to analyze the consideration not for the agreement as a whole but for article 10 by itself. For the courts, such an undertaking—particularly as to a *contract*—is fraught with complication.

Contracts, after all, are typically negotiated as a unit. Parties routinely make concessions in one provision so that, in another, they might obtain something they value more. Beyond that, contractual provisions are separate from each other only because that is how they are drafted. Consider a hypothetical two-article governmental contract, in which article 1 provides that a private party will supply 100 widgets, each worth two dollars, and article 2 states that "the government shall pay the private party \$200." If read in isolation, article 2 would be an unconstitutional "gift."

The Gift Clause does not supplant the basic contract-law principle that "we do not read contractual phrases in

isolation," *Point Energy Partners Permian, LLC v. MRC Permian Co.*, 669 S.W.3d 796, 808 (Tex. 2023), any more than it supplants the same principle for the interpretation of any other legal instrument. Slicing a contract into its constituent parts artificially treats a contract as no more than a collection of mini-contracts, each of which must have its own consideration. [*20]

On the other hand, if the Gift Clause applies to contracts at all, *refusing* to assess individual provisions would allow a city to make an otherwise impermissible gift simply by inserting it into a larger contract. Contractual clauses must survive scrutiny on their own, but that does not require or authorize reading them in isolation. Getting the balance right is important.

It is perhaps fortunate that this case does not require us to determine where the line is; we can reserve that question for a case in which it will be dispositive. It is not dispositive here because article 10 itself, particularly when viewed through the contextual lens of the agreement's preamble, provides adequate consideration and thus satisfies the first requirement of *Texas Municipal League*.

Article 10 does not authorize "giv[ing] away" anything. See *post* at 20 (Busby, J., dissenting in part). It is not a "no strings attached" gratuity because it authorizes ordinary salaries and benefits for firefighters who, in exchange, perform business activities related to their employment when using ABL time.¹⁶ Specifically, ABL must be used for activities—like collective-bargaining negotiations, adjusting grievances, dispute-resolution proceedings, addressing [*21] cadet classes, and attending union conferences—that are presumably proper and provide sufficient return consideration for the City. Each activity is authorized and proper *to the extent* that it furthers the agreement's overarching purpose of achieving and maintaining harmonious relations. Each activity is further limited by the Association's recited pledge of "support[ing] the service and mission of the Austin Fire Department." According to article 10's plain terms, the related business activities, whether undertaken by the Association's president or anyone else, must advance the interest of the Austin Fire Department.

¹⁶The dissent acknowledges that article 10 would only be unconstitutional if it authorized expenditures of public funds "for uses not related to . . . governmental duties," or for no particular use at all, *i.e.*, "as a gratuity." *Post* at 5 (Busby, J., dissenting in part).

The fire chief must approve all requests to use ABL. Article 10's express delineation of permissible ABL uses (and of some categorically prohibited ones) means that neither the Association's president nor the fire chief may approve requests that the text does not authorize. If an activity *is* permissible and requested under article 10's procedures, the chief must approve it, unless "the operational needs of the Department" require otherwise. In short, nothing in article 10 leads to the conclusion that it does not support the overarching purposes of the collective-bargaining [*22] agreement.

The result would be the same even if we did not conclude that article 10's text unambiguously reflects the restrictions on ABL use that we describe in this opinion. The doctrine of constitutional avoidance, which "allows courts to *avoid* the decision of constitutional questions" when presented with "competing plausible interpretations of a statutory text," would require us to give the contract a construction that steers clear of such constitutional difficulties unless the text foreclosed that construction. *Clark v. Martinez*, 543 U.S. 371, 381, 125 S. Ct. 716, 160 L. Ed. 2d 734 (2005); see also *Paxton v. Longoria*, 646 S.W.3d 532, 539 (Tex. 2022). After all, when courts scrutinize the other branches' actions or enactments, we start with the presumption that the rest of the government, no less than the judiciary, intends to comply with the Constitution. This principle is commonly invoked in the context of statutory interpretation.¹⁷ Compared to statutes, contracts are far less frequently subjected to constitutional attack—but when they are, the same underlying principle applies. Courts have no more reason to read a contract than a statute as pushing the bounds of constitutionality.¹⁸ In fact, courts

¹⁷ See, e.g., *Koy v. Schneider*, 110 Tex. 369, 221 S.W. 880, 888 (Tex. 1920) ("In determining the constitutionality of an act of the Legislature, courts always presume in the first place that the act is constitutional. They also presume that the Legislature acted with integrity, and with an honest purpose to keep within the restrictions and limitations laid down by the Constitution." (quoting 1 John Lewis & J.G. Sutherland, *Statutes and Statutory Construction* § 82 (2d ed. 1904))); *Ashford v. Goodwin*, 103 Tex. 491, 131 S.W. 535, 537 (Tex. 1910) ("When the Legislature passed that act, they must, in the discharge of their duty, have determined that the power to so enact was conferred upon that body by the language [of the Constitution].").

¹⁸ See, e.g., *United States v. Winstar Corp.*, 518 U.S. 839, 875, 116 S. Ct. 2432, 135 L. Ed. 2d 964 (1996) (plurality op.) (explaining how the unmistakability doctrine in contract law serves "[t]he same function of constitutional avoidance" by

must interpret even *private* contracts to avoid a construction that renders the contract unlawful.¹⁹ It is doubly [*23] important, therefore, for courts to read a *governmental* contract to avoid constitutional issues unless its text makes such an interpretation impossible.

We conclude, therefore, that neither the agreement as a whole nor article 10 individually authorizes a gratuitous payment or transfer to the Association.

B

We next analyze whether the predominant objective is to accomplish a legitimate public purpose, not to provide a private benefit. See *Tex. Mun. League*, 74 S.W.3d at 383; see also *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 740 (Tex. 1995) ("A transfer of funds for a public purpose, with a clear public benefit received in return, does not amount to a lending of credit or grant of public funds in violation of article III, sections 51 and 52.").

Said more directly, *some* private benefit will almost inevitably arise from government payments to non-government entities or individuals; the Gift Clause does not treat such an inevitability as a poison pill that dooms a much larger public objective. See, e.g., *City of Aransas Pass v. Keeling*, 112 Tex. 339, 247 S.W. 818, 819 (Tex. 1923) (holding that the construction of "sea walls and breakwaters on the Gulf coast, though of special benefit to particular communities, must be regarded as promoting the general welfare and prosperity of the state"). At the same time, however, it is easy to adorn [*24] an otherwise-illegal transfer to a

"avoiding difficult constitutional questions about the extent of state authority to limit the subsequent exercise of legislative power" when a prior government contract allegedly contracted away sovereign responsibilities).

¹⁹ *Tex. Emps.' Ins. Ass'n v. Tabor*, 283 S.W. 779, 780 (Tex. Comm'n App. 1926, judgm't adopted) ("[P]arties are presumed to know the law, and are likewise presumed to intend that their agreement shall have legal effect."). Contracts are therefore to be interpreted to avoid illegality. See Restatement (Second) of Contracts § 203 ("[A]n interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect."); *Phila. Indem. Ins. Co. v. White*, 490 S.W.3d 468, 483 (Tex. 2016) ("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." (quoting *Lewis v. Davis*, 145 Tex. 468, 199 S.W.2d 146, 149 (Tex. 1947))).

private recipient with a mere bauble of public purpose. Even if such a transfer technically complies with the "gratuity" requirement, the Gift Clause still forbids a transfer when the public purpose is the caboose rather than the engine.

As with the enactments at issue in *Texas Municipal League*, we presume that article 10's predominant purpose is to accomplish a legitimate public purpose unless petitioners show that it clearly is not. 74 S.W.3d at 381. "What is a public purpose cannot be answered by any precise definition further than to state that if an object is beneficial to the inhabitants and directly connected with the local government it will be considered a public purpose." *Davis v. City of Taylor*, 123 Tex. 39, 67 S.W.2d 1033, 1034 (Tex. 1934) (quoting 6 Eugene McQuillin, *Law of Municipal Corporations* 292 (2d ed. 1928), and discussing Tex. Const. art. VIII, § 3, which requires that taxes be levied "for public purposes only"). "Suffice it to say that, unless a court can say that the purposes for which public funds are expended are *clearly not* public purposes, it would not be justified in holding invalid a legislative act . . . providing funds for such purposes." *Davis v. City of Lubbock*, 160 Tex. 38, 326 S.W.2d 699, 709 (Tex. 1959) (emphasis added) (quoting *Davis v. City of Taylor*, 67 S.W.2d at 1034).

These standards protect the separation of powers and advance the principle of self-government. [*25] The other branches of government, no less than the courts, are obligated to follow the law and to serve the public; challengers must show, and not ask the judiciary to assume, that the policy-making branches have done otherwise. Petitioners have not made this showing here because we cannot read article 10 to be so dissociated from accomplishing legitimate public purposes. Under article 10, "Association business activities" is a key *limitation*, even if it at first blush sounds like an unlimited grant to the union.

ABL's uses are restricted by § 1(B)(1) and (2) of article 10, which both address "Association business activities." The Association's president, for example, is authorized to "use ABL for any lawful *Association business activities* consistent with the Association's purposes." (Emphasis added.) Other authorized representatives may use ABL for "*Association business activities* that directly support the mission of the Department or the Association, but do not otherwise violate the specific terms of [article 10]." (Emphasis added.) So even if something is an "Association business activity," other restrictions in the text—like the

president's limitation to activities "consistent with the Association's purposes" [*26] or the various additional limits on other firefighters—*further* confine how ABL may be used. Said differently, ABL is unavailable unless the contemplated endeavor falls under "Association business activities" as defined in the agreement *and* is not restricted by the additional text in § 1(B)(1) and (2) of article 10.

The key question, then, is what "Association business activities" means. Two provisions of the agreement govern this term: article 10 itself, which defines "Association business," and article 1 (the agreement's preamble), which constrains the scope of permissible "Association business activities."

Article 10 defines "Association business" as "time spent in Collective Bargaining negotiations; adjusting grievances, attending dispute resolution proceedings, addressing cadet classes during cadet training . . . , and attending union conferences and meetings."²⁰ While some of these examples *could* be read to reach non-public purposes, the text does not "clearly" contemplate such a use. Properly understood, each enumerated example relates to maintaining a stable employment relationship between the City and its firefighters and ensuring that the fire department better serves the public. Even in otherwise barring "the use [*27] of ABL for legislative and/or political activities" "[a]t the local level," article 10 exempts from this proscription only "raising concerns regarding firefighter safety," which is a high public purpose, not merely a private concern. In other words, we read article 10's authorizations as limited to circumstances that advance the important public purposes of the larger agreement, even if accomplishing those purposes also leads to some collateral private benefit. This reading is consistent with our duty to construe the provision as constitutional if we can, as well as the constitutional mandate that the public purpose predominate over any incidental private

²⁰ There is some dispute about whether this definition operates to define "Association business" for purposes of ABL usage by the Association president *and* other authorized Association representatives, or just the latter. We read it to apply to both because the same term is used in both and the term is defined. The definition is in § 1(B)(2), which is focused on "Authorized Association Representatives," but nothing suggests that the same term would have a different meaning. The definition's location, in other words, does not displace the definition's clarity. We note, moreover, that the new collective bargaining agreement, *see supra* note 1, even more clearly uses the definition for both the president and for others.

benefit.

The text itself confirms this understanding. The agreement's preamble states:

WHEREAS, the Association has pledged to support the service and mission of the Austin Fire Department, to constructively support the goals and objectives of the Austin Fire Department, and to abide by the statutorily imposed no strike or work slowdown obligations placed upon it;

WHEREAS, it is the intent and purpose of this Agreement to achieve and maintain harmonious relations between the parties, and to establish benefits, rates of pay, hours of [*28] work, and other terms and conditions of employment for all members of the bargaining unit and to provide for the equitable and orderly adjustment of grievances that may arise during the term of this Agreement . . .

From these recitals there is no "clear" indication that using ABL to conduct "Association business" authorizes improper, private purposes. Association business instead contemplates activities that (1) are consistent with the Association's affirmative pledge to support the City's Fire Department,²¹ (2) "maintain harmonious relations" between the City and its firefighters, and (3) establish "conditions of employment" and provide for the "adjustment of grievances." Put another way, we conclude that these recitals unambiguously reflect the parties' intent to use ABL in a way that benefits the public.

Borgelt argues that some of these activities, like collective bargaining or dispute-resolution and grievance proceedings, amount to requiring the City to pay the employee to use ABL only to assume an "*adverse* or *adversarial*" role in representing other firefighters

²¹ The dissent refers to the Association's mission as being "distinct from the Fire Department's mission," as if their respective missions are mutually exclusive. *Post* at 2. There are undoubtedly distinctions, but article 10 reaches only the parts of the missions that coincide. The dissent disregards the Association's contractual obligation to support the Department. The trial court's unchallenged factual findings that the "missions of the [Department] and [Association] overlap and are not mutually exclusive," and that the Association's mission "includes furthering professional standards for firefighters, promoting fire fighter and public safety, and working towards more harmonious labor relations," reflect the point that any parts of the Association's mission that do not intersect with the Department's are not proper bases for ABL.

"against the City." This complaint, we agree, has some force. We do not dispute that paying for such things *could* [*29] violate the Gift Clause for several reasons. Something purely adverse to the public interest would presumably never qualify as predominantly serving the *public* interest. So if a governmental contract had as its goal paying for something whose purpose was solely to oppose the government, it would be quite hard to see any plausible public benefit. Suppose that the City chose (unilaterally, not as part of a contract) to pay for political consultants or lobbyists whenever an individual firefighter wanted to attack the department's policies or positions. Such a blank check might "at best [be] a gratuity, a bonus to the employé. The [C]ity might as well pay his doctor's fee, his grocer's bill, or grant him a pension." *City of Tyler v. Tex. Emps.' Ins. Ass'n*, 288 S.W. 409, 412 (Tex. Comm'n App. 1926, judgment adopted).²²

But as we explained above, *supra* Part II.A, article 10 is not a gratuity. Instead, it is a negotiated benefit available to *all* City firefighters, including those who are not members of the union.²³ The legislature has decreed

²² We express no view of how the judges who wrote *City of Tyler* would regard modern government programs dealing with the three issues to which it alludes—publicly paid health insurance, food stamps and other cash transfers, and the like.

²³ Petitioners and the dissent suggest that, to the extent the ABL scheme is considered a form of compensation to all firefighters, the scheme violates the First Amendment by compelling firefighters who are not members of the union to subsidize union speech. See *Janus v. Am. Fed'n of State, County, & Mun. Emps., Council 31*, 585 U.S. 878, 138 S. Ct. 2448, 201 L. Ed. 2d 924 (2018). Collective-bargaining agreements could compel speech that would implicate the free-speech provisions of the U.S. and Texas Constitutions, but it is far from clear how this one could do so. At issue in *Janus* was an Illinois law forcing public employees "to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities." *Id.* at 884-85. The Supreme Court held that the law "violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern." *Id.* at 885-86. Here, article 10 does not require non-members to subsidize or participate in ABL. Those who use ABL receive their normal salary and benefits, as with any paid-time-off provision. In any event, no potentially aggrieved firefighter has brought a First Amendment challenge and the parties do not directly claim such a violation.

Further, our decision confirms that the scope of authorized ABL is narrow, that ABL is available to all firefighters, and that

that it is Texas policy to regard "collective bargaining [as] a fair and practical method for determining compensation and other conditions of employment" for firefighters. Tex. Loc. Gov't Code § 174.002(b). And properly adjusting grievances is, for that matter, not entirely "adverse" to the City's interest—doing so relates to the sound management of the department, not just the self-interest of the person who files a grievance or is the subject of discipline. Yielding accurate results from these processes is why the department has grievance processes. Proper resolution serves the public interest. If, as part of a negotiated employee benefit, ABL facilitates the streamlined and efficient resolution of grievances in ways that benefit both the firefighters and the City, such ABL uses advance a public purpose—or, at the very least, it is not clear that they do not. In any event, our construction of "Association business activities" categorically excludes activities that [*30] lack a clear nexus to a predominant and legitimate public purpose, *even if* one might otherwise call such activities "Association business." ABL that is used to undermine the City *without* advancing a public interest would pose quite a different scenario.

Given this construction, we cannot say that the agreement goes beyond a policy decision that the City is authorized to make when engaging in negotiations. See *Davis v. City of Taylor*, 67 S.W.2d at 1034 (recognizing that a legislative body, in deciding "what are public purposes . . . is vested with a large discretion which cannot be controlled by the courts, except, perhaps, where its action is clearly evasive, and where, under pretence of a lawful authority, it has assumed to exercise one that is unlawful" (quoting Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 155 (5th ed. 1883))). We do not and are not asked to *endorse* article 10; we simply conclude that, whether ABL is wise or foolish, the agreement's text constrains ABL to uses that satisfy our "public purpose" jurisprudence.

The bulk of petitioners' remaining complaint about article 10 is that the Association [*31] president and other authorized representatives improperly use ABL for

ABL is in no sense property *of the union*. These holdings mean that article 10 functions quite differently from the understanding of article 10 that petitioners suggest would violate the First Amendment. Indeed, as construed, article 10's "benefit" is rather like many other collectively bargained benefits that employees may use but elect not to do so. In any event, we need not *foreclose* a free-speech challenge; if one is brought, the courts will address it in the ordinary course.

political activities and "other Association business" such as fishing fundraisers, boxing matches, parties, and the like. Petitioners invoke these examples to show *why* article 10 must be unlawful—if it allows such things, then how could it be lawful? But even if we were to assume that these examples constituted improper uses of ABL,²⁴ they could not overcome our textual analysis of article 10. For one thing, these complained-of activities are notably absent from the trial court's findings of fact, which petitioners did not challenge at the court of appeals and which they do not ask us to supplement, alter, or disregard. See *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 696 (Tex. 1986) (stating that "unchallenged" findings of fact "are binding on an appellate court unless the contrary is established as a matter of law, or if there is no evidence to support the finding"); *Herbert v. Herbert*, 754 S.W.2d 141, 144 (Tex. 1988) ("appellate courts are not authorized to substitute their findings for those of the jury"). For another, article 10 does not authorize but *forbids* uses of ABL that do not satisfy the requirements we have described. As respondents agree, that provision expressly prohibits using ABL for "political activities,"²⁵ with a few narrow exceptions [*32] relating to firefighter safety and employment conditions. See Appendix, *infra*.

As to the other alleged misuses, even assuming that they have occurred other than on errant one-off occasions, they would constitute potential violations, not manifestations, of article 10. The City and the Association must abide by the agreement's terms, which we have construed. On that basis, the presumption that article 10 itself serves a predominantly public purpose stands un rebutted. Even if they do not so abide, a *breach* of contract is not necessarily evidence that the

contract is itself unconstitutional.²⁶ For example, payments to a firefighter who wrongfully reported that he worked (or used ABL time) on a given day (or similar violations) could be addressed by employment law, contract law, the law of fraud, or even criminal law. Not all contractual violations (indeed, very few) are of *constitutional* significance. If it were otherwise, all aspects of government functioning would become constitutionalized under the Gift Clause, effectively turning Texas courts into full-time hall monitors who oversee the minute operations of the rest of the government. The Gift Clause is important, but it was not intended as a tool [*33] for the judiciary to elevate itself above the other branches.

C

Lastly, the City must also "retain public control over the funds to ensure that the public purpose is accomplished and to protect the public's investment." *Tex. Mun. League*, 74 S.W.3d at 384; see also *Jefferson County v. Bd. of County & Dist. Rd. Indebtedness*, 143 Tex. 99, 182 S.W.2d 908, 913 (Tex. 1944) (observing that certain funds were not granted for "unrestricted use").²⁷ Put another way, the City cannot make a "no-strings-attached" payment to the Association. Under the collective-bargaining agreement, the City "retain[s]" at least two direct, contractual controls over article 10.

First is control over how ABL is used. Article 10 does not authorize ABL for just *any* purpose.²⁸ Article 10 instead requires that ABL be used for the Association business activities described above—activities that we

²⁴ While petitioners attack such examples as self-evidently unlawful, the Association president's testimony suggests a more complicated context: "Every time ABL leave is used for one of these events . . . , it's used to help conduct the event, not to participate in the event. So the fishing tournament, people aren't going fishing. They're working the event. They're setting it up. They're making sure the event goes well." Because our resolution is confined to article 10's meaning and its constitutionality, we need not and do not resolve the disputed and factbound questions of whether or to what extent any particular example of ABL use was proper or improper under our construction of article 10.

²⁵ We note that some of these limitations may be grounded in existing law. See, e.g., Tex. Loc. Gov't Code § 143.086(a) ("While in uniform or on active duty, a fire fighter or police officer may not take an active part in another person's political campaign for an elective position of the municipality.").

²⁶ As we discuss below, parties who execute a contract that (if obeyed) satisfies the Gift Clause could still be subject to a Gift Clause claim if their implementation of the contract indicates sufficient disregard of the contract's requirements. See *infra* Part II.C.

²⁷ See *supra* note 11 and accompanying text (describing the historical origins of the Texas Gift Clauses).

²⁸ The Association's president testified that firefighters using ABL cannot use it for whatever they choose; they could not, for example, use ABL to go on vacation with their family or to stay at home and watch television all day. This contrasts, for example, with a separate article in the agreement, article 12, providing for "vacation leave," under which firefighters may presumably receive their salaries and benefits without the City controlling how they spend their individual vacation time *at all*. Petitioners do not contend that the "vacation leave" provision poses any Gift Clause concerns.

understand to be far more circumscribed in scope to be authorized under article 10 than petitioners allege. The fire chief, a City employee, must approve ABL requests, "subject only to the operational needs of the Department." But the chief retains authority to deny ABL use for unauthorized purposes—that is, he *should* deny ABL for any activity that does not fit within article 10.²⁹ The chief likewise has the authority—indeed, the duty—to deny even the [*34] purest uses of ABL if the department's operational needs require otherwise.

Second is managerial control over firefighters using ABL. Under article 4 of the agreement, the City expressly retains the right to manage the fire department and its work force. Included is "the right to discipline or discharge in accordance with Chapter 143 and this Agreement." If a firefighter uses ABL for improper purposes, the City may impose discipline, including potentially terminating the firefighter's employment.

The dissent declines to engage either of these controls. Instead, the dissent repeatedly invokes *Texas Municipal League* for the proposition that how ABL is "commonly used" conclusively establishes that the City has not actually exercised control over the funds to ensure that article 10's public purpose is accomplished.³⁰ *Post* at 2,

²⁹ The fire chief's designee who oversaw reviewing and approving ABL requests confirmed that City approval was needed for ABL, that he sought to exercise this authority to keep approved ABL within article 10's limits, and that in several instances (including a political one) he exercised that authority to deny ABL. We express no view regarding any particular exercise of judgment or the process leading to the exercise of judgment, but reiterate that the record makes it difficult at best to disregard the trial court's unchallenged finding that the City properly "has denied ABL requests that . . . do not comply with Art. 10 of the CBA."

³⁰ The dissent is mistaken to assert that the record "conclusively shows" that ABL was "commonly used for private purposes, including association political activities." [*35] *Post* at 9-10. The dissent's beliefs aside, respondents heavily dispute this point: "[The Association president] repeatedly testified that he did *not* use ABL for any political or lobbying activities." The dissent cites trial testimony for the proposition that "the president himself admitted that he routinely used publicly funded leave for political activities." *Id.* at 13 & n.12. Yet the president testified, "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." (Emphasis added.) Petitioners requested the trial court to make findings such as that the Association president "engages in political activities while on ABL," but the trial court made no such

10. The dissent then converts the trial court's findings that the City *knew* of no improper activities into a denunciation of the City's "head-in-the-sand approach." *Id.* at 15. To the contrary, as we have repeatedly explained, the implementation facts are heavily disputed and the trial court's findings after a bench trial were wholly inconsistent with the "facts" on which the dissent relies.

Article 10 does not disclaim the retained control that the Gift Clause mandates. To the contrary, it in no uncertain terms limits ABL to the defined business activities, is subject to the City's approval both for compliance with article 10's limits and for overriding departmental needs, and is checked by the City's managerial authority over ABL users. As with *Texas Municipal League*'s other requirements, we assume that the parties will comply with these requirements.

Today's case, in other words, does not allow us to define with any specificity the standards that would govern such an "as implemented" or "as applied" Gift Clause violation that might be found under a different record—one, for example, with a conclusive showing that parties to an agreement like this one regularly fail to fulfill its public purpose or refuse to "retain" the controls that their contract allows. *Tex. Mun. League*, 74 S.W.3d at 384. It is enough for today to recognize that such conduct would be tantamount to permitting what the Gift Clause forbids. Future cases, if they are brought, will need to address the complex line-drawing questions that will arise, such as how to determine when the parties to a contract have treated it with sufficient disregard to constitute an "as implemented" [*36] or "as applied" Gift Clause violation.

The basic principle, however, is clear enough—even if a contract itself satisfies the Gift Clause, the parties' conduct in implementing it may not. The Gift Clause must be obeyed in reality, not just in form; it bars the government from handing over property for nothing, *with or without* a contract that on paper is above reproach. It is necessary but not sufficient for an agreement's terms to comply with the Gift Clause. A contract that is constitutional on its face does not preclude an "as implemented" or "as applied" Gift Clause challenge.

The question we address today, though, is whether

findings. Again, on the record before us, we can make matter-of-law determinations concerning the agreement's meaning and the Gift Clause's requirements—but this case does not permit the factbound analysis that drives the dissent.

article 10 as written violates the Gift Clause, and we hold that it does not. The City and the Association have an obligation to ensure that article 10 is implemented consistently with its requirements as described in our decision. If they or others similarly situated do not, the courts will be open to entertain a future case built on a different record.

* * *

We hold that article 10 is not invalid under Article III, § 52(a). But petitioners' concerns are far from frivolous. Various options for Gift Clause litigation under our existing jurisprudence are already available, as we have stated. The legislature, however, is not limited to that existing framework. If the legislature [*37] concludes that greater restraints are necessary to ensure obedience to the Gift Clause, it can create new mechanisms to hold local governments accountable. It could impose limitations on how governmental units offer employment benefits, require greater public transparency, or provide oversight to ensure compliance with contracts that, at least formally, satisfy the Constitution. It could also conclude that, even if they formally comply with the Gift Clause, contractual terms for ABL or similar devices entail too great a risk of evading public controls or of being subverted to private purposes, and on that basis prohibit such provisions altogether as a prophylactic matter. The judiciary need not be the only part of the government that focuses on the Gift Clause and the values it represents.

III

We finally turn to the TCPA dispute between the Association and the original plaintiffs, Pulliam and Wiley. We conclude that, at the time of the hearing, the lawsuit exceeded the minimum standards needed to survive the Association's motion to dismiss. The plaintiffs' contentions were weighty and sufficiently supported, a point amplified by the complexities of the law and this record that our resolution of the appeal [*38] have revealed. We hold that the trial court erred in granting the TCPA motion, so the awards of fees and sanctions must also be reversed.

As by now is more than familiar, the legislature enacted the TCPA "to identify and summarily dispose of lawsuits designed only to chill First Amendment rights, not to dismiss meritorious lawsuits." *In re Lipsky*, 460 S.W.3d 579, 589 (Tex. 2015). "The TCPA was designed to protect both a defendant's rights of speech, petition, and association and a claimant's right to pursue valid legal

claims for injuries the defendant caused." *Montelongo v. Abrea*, 622 S.W.3d 290, 295 (Tex. 2021). In large measure, our voluminous TCPA jurisprudence tells the story of how Texas courts labor to account for both interests.

Expedited dismissal becomes available when a movant establishes that a "legal action is based on, relates to, or is in response to the party's exercise of: (1) the right of free speech; (2) the right to petition; or (3) the right of association." Tex. Civ. Prac. & Rem. Code § 27.005(b).³¹ The parties dispute whether, as a matter of law, the Association can or did make this initial showing. We need not resolve that dispute, however, because—even assuming that the Association met its requisite burden—the plaintiffs made "by clear and specific evidence a prima facie case for each essential element of the [*39] claim in question," *id.* § 27.005(c), which means that the district court should have denied the TCPA motion to dismiss.³²

We reiterate that plaintiffs' rebuttal burden is not remotely equivalent to requiring early proof that the plaintiffs will ultimately prevail. As we put it last Term, "[t]he Act does not select for plaintiffs certain to succeed; it screens out plaintiffs certain to fail—those who cannot support their claims with clear and specific evidence." *USA Lending Grp., Inc. v. Winstead PC*, 669 S.W.3d 195, 205 (Tex. 2023). The burden is to produce only "the minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true." *Lipsky*, 460 S.W.3d at 590 (internal quotation marks omitted). At the TCPA hearing, the trial court was presented with many of the same arguments and evidence that petitioners have placed before us—more than enough to make the case that they have pursued

³¹The Association filed its TCPA motion to dismiss in November 2016, which means that the statute's prior version controls this case. See Act of May 17, 2019, 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). Accordingly, all references to the statute are to the applicable 2013 version.

³²The parties also dispute two other legal points that, because of our resolution, we need not decide. First, Pulliam and Wiley contend that the Association, having chosen to intervene back into the case after successfully seeking dismissal from it, is estopped from pursuing relief under the TCPA. Second, Pulliam and Wiley contend that, when a plaintiff is challenging the lawfulness of *government* conduct, no party may respond by invoking the TCPA. We reserve these questions for another case, if one ever arises, in which they will affect the outcome.

throughout the legal system.³³ The evidence was more than sufficient to raise serious questions about whether the ABL scheme violated our Gift Clause jurisprudence.

Even assuming, therefore, that the TCPA may play a role in a case like this one—a question, again, that we do not address—its applicability was displaced here. To reach that conclusion, we need not rely on the [*40] fact that the trial court, based on materially the same evidence and arguments available at the TCPA hearing, required a trial on the merits regarding article 10's implementation. But we agree with petitioners, at least, that the need for the trial illustrates that the case is hardly the kind of slam-dunk for which the TCPA was enacted.

Indeed, affirming the court of appeals' merits judgment does not mean that we perceive no serious problems in the ABL scheme. To the contrary, our decision today upholds article 10 because its unambiguous terms satisfy the Gift Clause. Our resulting legal conclusions in no way warrant the view that the strong medicine of the TCPA was an appropriate response to the lawsuit. The opposite is true.

The trial court erred in granting respondents' TCPA motion to dismiss. Accordingly, we reverse the trial court's order granting attorneys' fees and sanctions to respondents.

IV

We reverse the court of appeals' judgment that affirmed the trial court's TCPA order of dismissal and its award of sanctions and fees against Pulliam and Wiley and, as to those issues, render judgment for Pulliam and Wiley. We otherwise affirm the court's judgment.

Evan A. Young

Justice

³³For example, petitioners included a copy of the collective-bargaining agreement, and the Association president testified at length. Petitioners presented evidence that the vast bulk of ABL time was used to conduct "other association business," which included attending fundraising galas, fishing trips, boxing events, and other things that most people would consider private purposes. Likewise, there was evidence that the City disapproved only four out of 356 ABL requests over a two-year span, raising questions about the requisite "control" by the City.

OPINION DELIVERED [*41] : June 28, 2024

APPENDIX

ARTICLE 10

ASSOCIATION BUSINESS LEAVE

Section 1. Association Business Leave

A. Creation of Association Business Leave

Authorized Association Representatives shall be permitted to have paid time off, designated as Association Business Leave (ABL), to conduct Association business under the conditions specified in this Article.

B. Permitted Uses of ABL

1. The Association President may use ABL for any lawful Association business activities consistent with the Association's purposes.

2. For other Authorized Association Representatives, ABL may be used for Association business activities that directly support the mission of the Department or the Association, but do not otherwise violate the specific terms of this Article. Association business is defined as time spent in Collective Bargaining negotiations; adjusting grievances, attending dispute resolution proceedings, 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. It is specifically understood and agreed that ABL shall not be utilized for legislative and/or political activities at the State or [*42] National level, unless those activities relate to the wages, rates of pay, hours of employment, or conditions of work affecting the members of the bargaining unit. At the local level, the use of ABL for legislative and/or political activities shall be limited to raising concerns regarding firefighter safety. Association Business Leave shall not be utilized for legislative and/or political activities related to any election of public officials or City Charter amendments. Association Business Leave shall not be utilized for legislative and/or political activities that are

sponsored or supported by the Association's Political Action Committee(s). Association Business Leave shall not be utilized for legislative and/or political activities at the local, state, or national levels that are contrary to the City's adopted legislative program. No Association Business Leave shall be utilized for activities prohibited by Section 143.086 of Chapter 143 or by the Texas Ethics Commission. Nothing contained in this Subsection is intended to limit the use of the individual firefighter's vacation time for legislative and/or political activities.

C. Written Request Required

All requests for ABL must be in writing and submitted at least [*43] 3 business days in advance to HQ support staff. To be considered timely, the request must be received in person, by fax, or by e-mail by noon of the day notice is due.

D. Approval of ABL Requests

The Fire Chief or the Fire Chiefs [sic] designee shall approve timely ABL requests, subject only to the operational needs of the Department.

Section 2. Funding and Administration of the Association Business Leave Pool

A. Manner of Funding

For the timeframe between the effective date of this Agreement and through December 31, 2017, the City will fund a pro rata number of hours of Association Business Leave to a pool of leave time to be used in accordance with this Article. Beginning January 1, 2018, and each subsequent year during the term of this Agreement, during the first ten (10) days of the calendar year, the City will contribute 5,600 hours of Association Business Leave to a pool of leave time which may be used in accordance with this Article. The City will track deductions from the pool as Association Business Leave is used.

B. Administration of Pool

Up to one thousand (1,000) hours remaining at the end of a calendar year will remain in the pool for use in the following year. However, at no [*44] time may the pool

exceed sixty six hundred (6,600) hours. Up to one thousand (1000) hours in the pool at the end of the Agreement will be available for use in the following year for Association Business Leave activities. The City and the Association shall track utilization of ABL.

C. Use of Association Business Leave by Association President

Beginning January 1, 2018, the Association President shall be permitted up to 2080 hours of Association Business Leave from the pool balance per year, less accrued leave time, which must be used under AFD policies, and shall be assigned to a 40 hour work week. The Association President shall account for all leave time taken under such status through the Fire Chiefs [sic] office and such time shall be subtracted from the Association leave pool. The Association President will not be entitled to overtime pay from the City for any hours using ABL leave. The Association President may at any time be required to return to duty if an emergency situation exists. The Association President may also be assigned to any special projects at the discretion of the Fire Chief. The pool balance will not be reduced by any hours that the President actually works at the [*45] direction of the Fire Chief. At the end of his/her term, the Association President will be allowed to return to the assignment s/he occupied before commencing ABL to perform duties as Association President.

D. Administrative Procedures

Administrative procedures and details regarding the implementation of this Article shall be specified in Departmental policy.

Concur by: BUSBY (In Part)

Dissent by: BUSBY (In Part)

Dissent

JUSTICE BUSBY, joined by Justice Boyd and Justice Devine, dissenting in part and concurring in the judgment in part.

The Gift Clauses of the Texas Constitution exist to protect taxpaying citizens from their government, which our history shows is vulnerable to capture by private special interests who seek to use public funds for their

own ends. That is what happened here.

The parties have stipulated that the Austin Firefighters Association is a private "labor union with organizational independence from" the City of Austin that represents most but not all city firefighters in collective bargaining and other employment-related matters. The Association extracted the following promise from the City: to pay about \$1.25 million in public funds to the Association's president and other authorized association representatives when they take time off [*46] from firefighting work to conduct association business that supports its mission. Their agreement recognizes that the Association's mission is distinct from the Fire Department's mission. And the agreement defines "association business" to include matters in which association representatives take actions adverse to the City. Thus, the City pays these representatives to bargain against it and to represent association members in contract grievances and disciplinary challenges.

I acknowledge the evidence that some association business serves important public purposes, including safety. But the record of the bench trial conclusively demonstrates that many actual uses of this paid time off either fall outside the agreement's broad definition of association business or otherwise promote the association's private interests. For example, association representatives have used paid leave to attend association PAC meetings and to support and oppose candidates for public office. And most of the agreement's few restrictions on paid leave have not been applied to the Association's president, who is off work all the time yet draws a full city salary. The City has employed no meaningful controls to [*47] separate the wheat from the chaff.

When a city pays some of its firefighters to perform work for an independent organization in this manner, it violates the plain terms of the Gift Clauses. The payments are commonly used for "private or individual purposes," especially political purposes, which shows that any notional government control over the paid time off has proven woefully inadequate to protect the government's investment of public funds. TEX. CONST. art. XVI, § 6. For this reason alone, the trial court erred in rejecting the request by city taxpayers and the State to declare this portion of the agreement unconstitutional as implemented. I also have serious concerns about some reasons the Court gives for rejecting the argument that the payments are a "donation" or gratuitous "grant" in aid of a "private . . . association" because city taxpayers do not receive clear and sufficient

consideration in return for the paid time off. *Id.* art. III, §§ 51, 52(a); *id.* art. XI, § 3.

The Court attempts to avoid declaring the payments unconstitutional by (1) recasting our precedent in a manner that unfortunately obscures what the words of the Gift Clauses require and (2) reinterpreting the agreement so that it will prohibit future expenditures the Court considers improper—something [*48] no party to the agreement or to this case has asked the Court to do. These maneuvers cannot erase the violations that have already occurred. And even if those violations were not conclusively established on this record, the Court's novel interpretation deprives the parties of fair notice and an opportunity to be heard regarding whether the Court's newly announced contractual controls were ever implemented by the City.

In essence, the Court fashions a paper tiger contract: as long as ambiguous wording can later be construed—and contrary wording recast—in a manner consistent with the Gift Clauses, it does not matter if the parties understood that contract differently and actually applied it in ways that violated the Clauses. I disagree. If the parties themselves did not think the agreement limited their private uses of city-funded leave, courts should believe them and enforce the constitutional restrictions—not create contractual restrictions that are recognized by neither party and cannot be enforced by anyone else. Because the Court's decision today threatens to pull the Gift Clauses' teeth, I respectfully dissent from the Court's opinion and most of its judgment. Yet because I would [*49] grant the taxpayers and the State partial declaratory relief, I concur in the portion of the Court's judgment reversing the award of fees and sanctions against them.

The Gift Clauses of the Texas Constitution broadly and repeatedly prohibit the State and its subdivisions from "giving," "grant[ing]," "appropriat[ing]," "donating," "subscribing," "lending," or "pledging" any "public money or thing of value" either (1) "in aid of, or to" "any individual, association or corporation whatsoever" or (2) "for private or individual purposes." TEX. CONST. art. III, §§ 50, 51, 52(a); *id.* art. XI, § 3; *id.* art. XVI, § 6(a). "Our goal when interpreting the Texas Constitution is to give effect to the plain meaning of the text as it was understood by those who ratified it." *In re Abbott*, 628 S.W.3d 288, 293 (Tex. 2021). Cases interpreting the clauses have so far said little about how the ratifiers

would have understood them, though the Court today sketches some of the Gilded Age practices that the clauses presumably were intended to stop. But our cases closest to the time of ratification did hew closely to the plain meaning of the text. Our more recent cases? Not so much.

In 1920, for example, we remarked in *Bexar County v. Linden* that "[n]o feature of the Constitution is more marked than its vigilance for the protection of the public funds [*50] and the public credit against misuse," as shown by its "numerous provisions" with "broad" language. 110 Tex. 339, 220 S.W. 761, 761 (Tex. 1920). "The giving away of public money, its application to other than strictly governmental purposes, is what [the Gift Clauses are] intended to guard against." *Id.* at 762. The Clauses "prohibition is a positive and absolute one," which denies government "any power to grant or to authorize the grant of public money." *Id.* Thus, if "the effect of the [challenged provision] is to bestow [public] funds . . . as a gratuity, or for uses not related to . . . governmental duties, it would be invalid." *Id.* (emphasis added).¹

Recognizing the breadth and strictness of these limits, the people of Texas have repeatedly amended the Constitution to authorize specific expenditures of public funds for private purposes when they have concluded as a policy matter that it is appropriate to do so.² The Constitution assigns this power to decide what it *should* say to the people and their elected legislators, not to judges sworn to protect the Constitution as it exists. See TEX. CONST. art. XVII; *McCombs v. Dallas County*, 136 S.W.2d 975, 981 (Tex. Civ. App.—Dallas 1940, writ

ref'd) (explaining that general constitutional prohibition on expenditures controls absent special constitutional provision authorizing [*51] expenditure at issue).

Our recent cases have usurped this power, transforming *Linden's* plain-text approach to the Gift Clauses into the hodgepodge of overlapping multi-factor tests that the Court describes. See, e.g., *ante* at 14-15 & n.14; *Tex. Mun. League Intergovernmental Risk Pool v. Tex. Workers' Comp. Comm'n*, 74 S.W.3d 377, 383-84 (Tex. 2002) [hereinafter *TML*].³ Because this development has not been tied to constitutional text, Texans are left to guess when a court may consider it appropriate to apply the Gift Clauses and when an amendment may be necessary. See *TML*, 74 S.W.3d at 389-392 (Owen, J., dissenting).

These wishy-washy cases have stunted the formerly healthy constitutional dialogue between Texas citizens and their legislators about when public funds may be given away, encouraging governments and taxpayers alike to look to courts and to the Attorney General for answers that we are neither constitutionally elected nor well-suited to provide. Texas has chosen a republican constitutional system that expressly separates and limits government power and reserves important rights to the people. See TEX. CONST. art. I, § 2; *id.* art. II, § 1; *id.* art. XVII. Courts interpreting such a Constitution keep the system vital by staying in our lane and drawing clear text-based lines that require other constitutional actors to do their own assigned jobs, [*52] hard as they may be. We must not arrogate more power to ourselves, or permit these other actors to abdicate their responsibilities in favor of the judicial branch, by sending murky messages about where the boundaries lie.

With the hope that better days are ahead for our jurisprudence on the Gift Clauses, I encourage interested parties, attorneys, historians, and other *amici* to help us explain their meaning clearly based on the text as understood by its ratifiers.⁴ But as the Court observes, the parties in this case have not pressed a request that we reexamine our precedent. Thus, like the Court, I apply that precedent here. Our recent cases do retain some textual touchstones, as I explain below.

¹ See also, e.g., *State v. City of Austin*, 160 Tex. 348, 331 S.W.2d 737, 742 (Tex. 1960); *Seydler v. Border*, 115 S.W.2d 702, 706 (Tex. Civ. App.—Galveston 1938, writ ref'd) (applying *Linden's* "strictly governmental purposes" standard); *Jones v. Alexander*, 122 Tex. 328, 59 S.W.2d 1080, 1083 (Tex. [Comm'n App.] 1933) ("The Constitution prohibits the Legislature from appropriating the public money to other than strict governmental purposes."); *City of Tyler v. Tex. Emps. Ins. Ass'n*, 288 S.W. 409, 412 (Tex. Comm'n App. 1926, judgm't adopted).

² See, e.g., TEX. CONST. art. III, § 51-a-1 (amending on November 7, 1989, to authorize financial assistance to local fire departments and other public firefighting organizations); *id.* § 51-c (amending on November 6, 1956, to authorize aid and compensation to persons improperly fined or imprisoned); *id.* § 51-d (amending on November 8, 1966, to authorize payment of assistance to survivors of public servants who suffered death in performance of hazardous duties).

³ This phenomenon is not unique to the Gift Clauses: our decisions have similarly muddled the Constitution's twin jury-trial guarantees. See, e.g., *In re Troy S. Poe Tr.*, 646 S.W.3d 771, 781 (Tex. 2022) (Busby, J., concurring).

⁴ See *Poe Tr.*, 646 S.W.3d at 782 (Busby, J., concurring).

The Court begins by setting its sights on a narrower but perhaps equally challenging objective: to reformulate those cases' tests for determining when a transfer of public money violates the Gift Clauses. Unfortunately, the Court's reformulation obscures that the Gift Clauses impose at least two distinct textual requirements for any payment, loan, or pledge of public funds by the State or one of its political subdivisions to or for the benefit of a private individual, association, or corporation. **First**, the payment [*53] cannot be a "donation" or gratuitous "grant," TEX. CONST. art. III, §§ 51, 52(a); *id.* art. XI, § 3, which our cases have said requires "sufficient . . . return consideration" that clearly benefits the subdivision's taxpayers.⁵ **Second**, the payment must at least predominantly serve a legitimate public purpose⁶ rather than "private or individual purposes," *id.* art. XVI, § 6, which we have explained includes the retention of sufficient "public control" over the funds to "ensure that the public purpose is accomplished and to protect the public's investment."⁷

The court of appeals found our precedent unclear

⁵ *TML*, 74 S.W.3d at 383-84 (explaining that "[a] political subdivision's paying public money is not 'gratuitous' if the political subdivision receives return consideration" that is a "clear public benefit" and, although such return consideration need not necessarily be "equal," it must be, at minimum, "sufficient" (emphases added)); *id.* at 384 (holding government must "ensure that the political subdivision receives a return benefit"); see also *Am. Precision Ammunition, L.L.C. v. City of Mineral Wells*, 90 F.4th 820, 826 (5th Cir. 2024) (holding agreement did not indicate any return benefit in exchange for city's payment). Sufficient return consideration must be received by the relevant political subdivision that authorized the payment. *Cf. Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 740 (Tex. 1995) (upholding transfer of funds outside school district where "voters in the school district" received benefit in return (emphasis added)); *Brazos River Auth. v. Carr*, 405 S.W.2d 689, 694 (Tex. 1966) (upholding transaction that "redounds to the benefit of the public which is served by the [Brazos River] Authority").

⁶ *TML*, 74 S.W.3d at 383-84.

⁷ *TML*, 74 S.W.3d at 384; see also *Davis v. City of Lubbock*, 160 Tex. 38, 326 S.W.2d 699, 702, 707 (Tex. 1959); *Corsicana Indus. Found., Inc. v. City of Corsicana*, 685 S.W.3d 171, 178 (Tex. App.—Waco 2024, pet. filed); *Key v. Comm'rs Ct. of Marion County*, 727 S.W.2d 667, 669 (Tex. App.—Texarkana 1987, no pet.); Tex. Att'y Gen. Op. No. MW-89, 1979 Tex. AG LEXIS 36, 1979 WL 31300, at *2 (1979). The Court recounts the history that led to this requirement of public control. *Ante* at 13 n.11.

regarding whether it is "enough to determine that [a] payment is not gratuitous." 684 S.W.3d 819, 829 (Tex. App.—Austin 2022). But we answered that question a century ago in a manner consistent with the Gift Clauses' plain text: the payment is prohibited unless both requirements are met. *Linden*, 220 S.W. at 762 (recognizing that the Gift Clauses prohibit payment of public funds "as a gratuity, or for [nonpublic] uses" (emphasis added)).

II

In applying the Gift Clauses' requirements, I agree with the Court that our focus should be on Article 10 of the agreement, which provides for the paid leave in question. *Ante* at 17-18. As the Court explains, analyzing these requirements [*54] at the level of the agreement as a whole would lead to absurd results: for example, as discussed at oral argument, the City could agree to buy a red Ferrari for the Association president because another provision of the same agreement obligates firefighters to provide firefighting services that benefit Austin taxpayers. That approach would render the Gift Clauses meaningless.

With this focus and the presumption of constitutionality in mind, I conclude the challengers carried their burden to prove that Article 10 leave payments violated the Gift Clauses' requirements. The trial court should have rendered judgment for the taxpayers and the State, declaring the Article 10 payments unconstitutional as implemented.

A

The City violated the Gift Clauses by providing publicly funded leave to conduct association business because the City did not actually "retain public control over the funds to ensure that the public purpose is accomplished and to protect the public's investment." *TML*, 74 S.W.3d at 384. Instead, the trial record conclusively shows that leave is either unmonitored or rubber stamped and has been commonly used for private purposes, including association political activities.

Texas courts have not had many opportunities to address [*55] this control requirement, but it is clear that the test is not merely whether the documents governing the payment—like the Soviet Constitution⁸ —

⁸ As Justice Scalia memorably observed in several speeches,

have the right words on paper that *allow* control. Of course, a Gift Clause violation will occur if the government does not even have the option to control how the payment is used. *E.g.*, *Tex. Pharm. Ass'n v. Dooley*, 90 S.W.2d 328, 330 (Tex. Civ. App.—Austin 1936, no writ) (holding law void that "directs [public funds] be paid over to a private corporation, not under the control of the Board of Pharmacy, nor regulated by the act itself").

But the Gift Clauses also demand more: the government must *require* that the funds serve a public purpose by actually implementing "adequate contractual or other controls" to "ensure its realization." Tex. Att'y Gen. Op. No. MW-89, 1979 Tex. AG LEXIS 36, 1979 WL 31300, at *2 (1979) (emphasis added); *TML*, 74 S.W.3d at 384 (holding government "must . . . retain public control . . . to ensure that the public purpose is accomplished"). "Long before the *Texas Municipal League* decision, when determining the constitutionality of any provision authorizing use of public funds committed in furtherance of some public purpose, courts have considered whether the governmental entity properly supervised [*56] and controlled the enterprise." *Corsicana Indus. Found., Inc. v. City of Corsicana*, 685 S.W.3d 171, 178 (Tex. App.—Waco 2024, pet. filed) (citing cases); see *Byrd v. City of Dallas*, 118 Tex. 28, 6 S.W.2d 738, 741 (Tex. [Comm'n App.] 1928) (considering whether "maladministration" of the funds had been shown). Put simply, "continuing public control" over "the performance of the contract" is "necessary to insure that the [government] receives its consideration: accomplishment of the public purpose." *Key v. Comm'rs Ct. of Marion County*, 727 S.W.2d 667, 669 (Tex. App.—Texarkana 1987, no pet.) (emphasis added).⁹

the Soviet Constitution contained a much more robust bill of rights than the American one; but it was merely "words on paper, what our Framers would have called a parchment guarantee." *Considering the Role of Judges Under the Constitution of the United States: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 6-7 (2011) (statement of Antonin Scalia, Associate Justice, Supreme Court of the United States) (citing THE FEDERALIST NO. 48 (James Madison)).

⁹ The Court agrees that the Gift Clauses cannot be "honored in name yet ignored in practice." *Ante* at 3. And I agree with the Court that "errant one-off" failures to apply controls would not constitute a Gift Clause violation. *Id.* at 29. But there is no need for fine line-drawing here. As discussed below, the record conclusively shows that there were wholesale failures to use the few controls the parties thought they had and no attempts to use the new controls the Court discerns in the

We must apply this legal standard to the facts regarding the parties' implementation of Article 10, not merely to that article as written or as construed by the Court. The taxpayers and the State sought a declaration that the City has granted benefits under Article 10 in violation of the Gift Clauses, and the trial court denied respondents' motion for summary judgment in part with regard to the City's implementation of the agreement. The court then conducted a bench trial on that issue and concluded that the City's implementation did not violate the Gift Clauses. The taxpayers and the State challenge this conclusion on appeal, arguing that the record shows conclusively that the City did not exercise meaningful control over actual use of the leave in practice. I agree that the record supports their challenge.

Article 10 creates two types of leave in separately numbered paragraphs: [*57] one for the Association's president, who is always on city-funded leave to conduct "any lawful association business activities consistent with the Association's purposes"; and another for other association representatives, who may use leave for specified "Association business activities that directly support the mission of the Department or the Association, but do not otherwise violate the specific terms of this Article." The evidence showed that neither was subject to adequate public "control over the performance of the contract" to ensure the leave accomplishes a predominant public purpose. *Id.* at 669.

Regarding the Association's president, the trial record conclusively establishes that the City had no say in who was appointed to the position, could not remove him, did not direct his activities during the relevant time, did not supervise or even review his performance, and placed no prohibitions on his work for the Association. More importantly, both the City's representative and the president himself admitted that he did not—and was not required to—describe on his timesheets how he used his paid leave. Thus, there was no way for the City to monitor that use, and it never disapproved any use [*58] of leave by the president. The president was in essence a publicly funded full-time employee of the Association who did no work for the Fire Department.¹⁰

Similarly, the record shows that the publicly funded

agreement today.

¹⁰ The court of appeals observed that the president was also a Department employee and could be fired from the latter position, 684 S.W.3d at 836, but that does not give the City authority to rewrite the agreement to restrict how he—or any successor—uses the leave while serving as president.

activities of other authorized association representatives approved by its president and executive board were not controlled or directed by the City. Over 75 percent of their leave time was reported to the City simply as "other association business," which is not even a category of leave recognized by the agreement. And the fire chief's designee tasked with reviewing the association-approved requests to use leave rubber stamped 99 percent of them, many of which did not contain a statement of purpose that would permit meaningful review.¹¹ That outcome is unsurprising, as Article 10 provides that the Chief "shall approve timely [leave] requests, subject only to the operational needs of the Department," and the City's governing policy provided that timely "[r]equests for authorized ABL from the Association . . . are automatically approved" subject to operational needs.

In short, no reasonable factfinder could determine that this process "ensure[s] that [a] public purpose is accomplished" [*59] by the leave or "protect[s] the public's investment" in this private association. *TML*, 74 S.W.3d at 384. Instead, the City's representative testified and the president himself admitted that he routinely used publicly funded leave for political activities like supporting and opposing candidates for election, preparing and providing endorsements, and arranging for placement of political signs, and he spent twenty-five to thirty percent of his leave time lobbying the City Council and the Legislature.¹² Other authorized

¹¹ The Court mentions that the chief's designee did deny leave to other association representatives—but not the president—in a few instances. Specifically, he testified that he denied about one percent of requests. But as discussed below, he testified at trial that he routinely approved use of leave by these representatives for association PAC meetings—which Article 10 expressly prohibits.

¹² This point is not simply a matter of my "beliefs." *Compare ante* at 32-33 n.30, *with* 4 RR 66-69, 144; 5 RR 98, 101, 123; 2 SCR 470-71. For example, the City's representative testified that the president "does, in fact, while he's utilizing [leave], conduct political activities" and "lobbying activities" despite "policies that you can't on City time conduct political activities." In the City's view, "there was only ever one restriction" on the president's use of leave for political activities, which was "that he could not on [leave] hand off money, checks, things like that to candidates."

Turning to the president, although he responded evasively at trial when confronted with several answers he had given at his deposition, he eventually admitted that "25 to 30 percent of [my] time" is "spent on lobbying activities" with the City Council and Legislature. He also acknowledged that he and other

association representatives were regularly approved to use leave to participate in meetings of the Association's political action committee even though Article 10 expressly says leave "shall not be utilized for legislative and/or political activities that are sponsored or supported by the Association's Political Action Committee(s)."¹³

The Court responds that the taxpayers and the State have not challenged any particular factual findings by the trial court. This response fails to blunt the force of the conclusive evidence I have just summarized for three reasons. First, there are no findings that directly address whether the City actually exercised control sufficient to ensure [*60] that the leave was used for public purposes. For example, the trial court found that the City was "not aware" of any uses of leave for political or other private purposes, but that head-in-the-sand approach is precisely the constitutional deficiency. Second, even if there were such findings, they would be contrary to the conclusively established facts I have just recounted. And third, now that the Court has reinterpreted Article 10 to permit even greater control that the City failed to exercise, the trial court's findings are immaterial because they are based on the wrong legal standard.

association members "when they're on duty . . . would use [leave] for those [PAC] meetings," where they "discuss . . . and decide what recommendations the PAC board is going to make regarding political issues, referendums, or candidates," including "supporting candidates for political office" and deciding "whether to give political contributions." And the president conceded that he "prepare[s] endorsement or opposition statements for political candidates" and "I do it during my work week." Similarly, he said "during the regular business hours, the work week, do I write a check for somebody to put out [political] signs? Yes, that is true."

The president also voiced his belief that these activities should not be considered part of his leave "because my work week well exceeds 40 hours." But he also testified that he does not "receive overtime for work over 40 hours," which is "time I'm volunteering as part of the duties of my position." In any event, the trial court did not base its decision on this legal question about whether after-hours work can somehow replace, for leave purposes, political activity conducted during business hours. The court did not mention the matter in its conclusions of law.

¹³ See 4 RR 91-96, 139-40; 7 RR 453; 2 SCR 546-568. The Court describes this evidence as merely things the taxpayers and the State "allege" or "say," and it implies that these uncontrolled uses may have occurred only "on errant one-off occasions." *Ante* at 6-7, 29. The documentary evidence of approved leave requests for PAC meetings shows otherwise.

In particular, the Court concludes that Article 10's authorization of paid leave should be interpreted far more narrowly than the parties to the agreement and to this case have, and that the fire chief "should deny" future leave requests outside that scope and "may" discipline those who misuse leave in violation of the agreement. *Ante* at 19, 23-24, 31-32. But that will not fix the problem: language in Article 10 expressly permits using publicly funded leave for some political and lobbying purposes, and no language prohibits its use to support the association fundraising activities the Court questions [*61] today, so there will be no basis for either discipline or denial of leave.¹⁴

More importantly, the Court's forward-looking response misses the present point of this case: the City has already made many uncontrolled payments to aid the Association in accomplishing its own private purposes. The Gift Clauses are violated when a government entity routinely "give[s]," "donates," or "grant[s] public money" to a "private . . . association" without the controls necessary to prevent its use "for private or individual purposes." TEX. CONST. art. III, §§ 50, 51, 52(a); *id.* art. IX, § 3; *id.* art. XVI, § 6.

This is a practical, facts-on-the-ground inquiry that deals in past occurrences and present realities: nothing in the constitutional text or our precedent suggests that it matters one whit whether the payments of public funds were in accordance with or contrary to a court's later thoughts about how the parties to a contract should have interpreted and applied it. Payments that violate the Clauses need not be made under a contract at all, and if they were, it is no defense that the payments repeatedly breached the contract—to the contrary, such evidence proves the ineffectiveness of any contractual controls. See *TML*, 74 S.W.3d at 384. Because the record conclusively shows that the City [*62] did not limit leave to public purposes, the taxpayers and the State are entitled to their requested declaration that leave payments under Article 10 violated the Gift Clauses.

Put another way, the Court's *sua sponte* reinterpretation of the agreement to allow or require additional controls just makes it even more clear that the City utterly failed to use those controls to ensure that a public purpose is accomplished. The evidence conclusively shows that the fire chief's designee did not apply Article 10's limits

on leave for other authorized association representatives to the president, *cf. ante* at 23-24 & n.21; indeed, it applied no limits to his leave whatsoever. Nor is there any evidence that the chief's designee categorically denied leave for activities that "lack[ed] a clear nexus to a predominant and legitimate public purpose," *id.* at 28, or even that he could do so on a tight timeline given the limited information available to him. For example, the record conclusively shows that he approved leave for "fishing fundraisers, boxing matches, parties, and the like" without inquiring whether those activities predominantly advanced a public purpose. *Id.* at 28.¹⁵

Even if this record did [*63] not conclusively establish the failure to use controls, the parties to the agreement and to this litigation can hardly be faulted for failing to anticipate the Court's new understanding of the controls Article 10 requires, which none of them requested. In circumstances where the governing legal standard changes on appeal, particularly in a manner that no party advocated in the trial court, the parties generally should receive a fair opportunity on remand to be heard and present tailored evidence addressing whether that standard was met.¹⁶ The Court's contrary approach deprives the parties of due process. See *Byrd v. Blue Ridge Elec. Co-op., Inc.*, 356 U.S. 525, 531-32, 78 S. Ct. 893, 2 L. Ed. 2d 953 (1958) (holding party "cannot

¹⁵Like the Court, I would not go so far as to hold that the fundraising events are prohibited at this juncture. See *ante* at 29 n.24; *infra* Part II.B. The record includes evidence that proceeds from these events were used to benefit the public, though there is no indication the chief's designee knew that.

¹⁶*E.g.*, *Carowest Land, Ltd. v. City of New Braunfels*, 615 S.W.3d 156, 158-59 (Tex. 2020) (explaining that "[t]he most compelling case for a remand in the interest of justice is where we overrule existing precedents on which the losing party relied at trial" (internal quotation marks omitted)); *Sw. Bell Tel. Co. v. John Carlo Tex., Inc.*, 843 S.W.2d 470, 472 (Tex. 1992) (holding that "[t]o ask the [fact finder] to resolve this [factual] dispute without a proper legal definition to the essential legal issue was reversible error" and remanding for new trial); *Coker v. Coker*, 650 S.W.2d 391, 392, 394-95 (Tex. 1983) (remanding for trial where both parties were mistaken regarding interpretation of governing contract language); *W. Union Tel. Co. v. Midgett*, 251 S.W. 253, 257 (Tex. Civ. App.—Beaumont 1923, no writ) ("The case having been tried upon an incorrect interpretation . . . , the cause ought to be remanded, unless we are able to say that the record shows with reasonable certainty that appellees will not be able to establish by proof the cause of action [under the correct interpretation], and we cannot so say.").

¹⁴Indeed, there is no language in the agreement or policies authorizing the chief to deny any leave to the Association's president.

be penalized by the denial of his day in court to try the issue under the correct interpretation").

Turning to whether the taxpayers and the State are also entitled to an injunction against continued payments under Article 10, I agree with the Court that we should consider whether the City will abide by the agreement's terms going forward. *Ante* at 30. But "[a] defendant's cessation of challenged conduct does not, in itself, deprive a court of the power to hear or determine claims for prospective relief." *Matthews v. Kountze Indep. Sch. Dist.*, 484 S.W.3d 416, 418 (Tex. 2016). Instead, the defendant bears a "heavy" burden [*64] to show that "subsequent events make absolutely clear that the challenged conduct could not reasonably be expected to recur." *Id.* (internal quotation marks omitted).

The City cannot make that showing here. Throughout this litigation, the City has not indicated any willingness to modify its Article 10 leave practices. And even if I agreed with the Court about what the new terms of the agreement are, which I do not, there is no certainty that compliance with those terms would abate the Gift Clause violations. Instead, as I have explained, the Court's terms provide no basis for discipline or denial of leave for many of the private purposes at issue. Accordingly, I would render judgment granting the taxpayers and the State declaratory relief that the implementation of Article 10 violated the Gift Clauses and remand for further proceedings regarding the need for injunctive relief and their request for attorney's fees.

B

Finally, I disagree with some of the reasons the Court gives for rejecting an alternative theory offered by the taxpayers and the State: that Article 10 payments violate the Gift Clauses because using public funds to pay firefighters to work for the Association is a gratuitous grant in aid of a private entity, [*65] which does not provide Austin taxpayers with a clear and sufficient benefit in return for that work. *See TML*, 74 S.W.3d at 383-84. The court of appeals emphasized that the Legislature has statutorily granted firefighters the right to organize for collective bargaining with cities regarding their compensation and other conditions of employment. *See TEX. LOC. GOV'T CODE* § 174.002(b). But we presume that the Legislature did so knowing that the Constitution's Gift Clauses limited the kinds of substantive terms that cities had the authority to accept through the collective bargaining process. *See In re Tex. Educ. Agency*, 619 S.W.3d 679, 687-88 (Tex.

2021).

In other words, a city cannot give away public funds to non-employees just because it agrees to do so as part of a collective bargaining agreement with its employees. The Supreme Court of the United States has drawn a similar distinction, holding that an interest in "labor peace" does not support compelling employees to subsidize public-sector unions at the expense of their constitutional rights to freedom of association. *Janus v. Am. Fed'n of State, County, & Mun. Emps., Council 31*, 585 U.S. 878, 895-96, 138 S. Ct. 2448, 201 L. Ed. 2d 924 (2018). Neither should that interest support obligating taxpayers to subsidize unions at the expense of constitutional restrictions on how their taxes may be spent.

The Court, for its part, contends that there is sufficient return consideration [*66] for the Article 10 payments in part because firefighters who receive their ordinary salaries and benefits from the City are simply performing business activities related to their employment that advance the interests of the Fire Department. *Ante* at 18-19. But as the Court itself recognizes elsewhere, this case challenges only paid leave to work for the Association under Article 10, which must be considered separately from the ordinary salaries and benefits of firefighters under Article 9. Moreover, accepting the Court's suggestion that Article 10 payments to perform work for the Association are "a negotiated benefit available to *all* City firefighters, including those who are not members of the union," *id.* at 26, would mean that the agreement requires nonmembers to use part of their compensation to subsidize private union activities they may not support—a violation of the First Amendment.¹⁷

Nevertheless, I agree with the Court that under a narrow paid-leave provision structured the way the Court views this one, individual firefighters would be more likely to use leave to help the department better serve the public, maintain a productive employment relationship with the

¹⁷ *See Janus*, 585 U.S. at 893 ("Compelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns."); *id.* (recognizing "that a significant impingement on First Amendment rights occurs when public employees are required to provide financial support for a union" (internal quotation marks omitted)); *id.* at 930 (holding it violates the First Amendment to collect a "payment to [a public-sector] union . . . from a nonmember's wages . . . unless the employee affirmatively consents to pay").

City, and promote [*67] firefighter safety, *ante* at 24-28—uses that arguably provide a sufficient return benefit to Austin taxpayers. Given the lack of briefing from the parties regarding the constitutionality of such an agreement, I am not prepared to hold today that the agreement would, on its face, violate the Gift Clause on the alternative ground that it did not provide taxpayers with sufficient return consideration.

III

The taxpayers and the State have proven conclusively that Article 10 grants public funds to aid a private association without implementing controls to ensure that the funds predominantly serve legitimate public purposes. Accordingly, the trial court should have rendered judgment in their favor, declaring that Article 10 leave was implemented in violation of the Gift Clauses. Because the Court affirms the trial court's contrary judgment, I respectfully dissent. I concur in the court's judgment reversing the award of fees and sanctions against the taxpayers and the State, however, and I would remand for the trial court to consider their requests for fees and injunctive relief.

J. Brett Busby

Justice

OPINION FILED: June 28, 2024