No. 03-21-00227-CV

In the Court of Appeals
for the Third Judicial District
Austin, Texas

Roger Borgelt; Mark Pulliam; Jay Wiley,

Plaintiffs/Appellants,

Texas,

Intervenor-Plaintiff/Appellant,

v.

City of Austin; Marc A. Ott, in his official capacity as City Manager of Austin; and Austin Firefighters Association, Local 975,

Defendants/Appellees.

On Appeal from the
419th Judicial District Court, Travis County

BRIEF OF AMICI AMERICANS FOR PROSPERITY FOUNDATION, UPPER MIDWEST LAW CENTER, AND MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PLAINTIFFS/APPELLANTS AND TEXAS

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BRIEF OF *AMICI CURIAE* AMERICANS FOR PROSPERITY FOUNDATION AND UPPER MIDWEST LAW CENTER IN SUPPORT OF PETITIONER

Pursuant to Texas Rule of Appellate Procedure 11, Americans for Prosperity Foundation and the Upper Midwest Law Center ("UMLC") respectfully submit this *amici curiae* brief in support of Plaintiffs/Appellants and Texas.[1][2]

INTEREST OF *AMICI CURIAE*

Amicus curiae AFPF is a 501(c)(3) nonprofit organization that operates a state chapter in Texas ("AFPF-TX") committed to educating and empowering Americans to address the most important issues facing our country, including civil liberties and constitutionally limited government. AFPF-TX is interested in this case because the protection of the freedoms of expression and association, guaranteed by the First Amendment, are necessary for an open and diverse society.

Amicus curiae UMLC is a 501(c)(3) nonprofit public interest law firm which litigates matters of public interest in Minnesota and the Upper

[1] This brief has been served on all parties.
[2] *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no fee has been paid or will be paid for the preparation or submission of this brief.

Midwest in an effort to limit governmental, special interest, and public union overreach and abuse. UMLC currently represents public employees whose First Amendment rights have been violated by public unions in six cases before the federal Eighth Circuit Court of Appeals. UMLC also represents three municipal taxpayers in a First Amendment challenge to a public union's use of a "release time" clause within its collective bargaining agreement. The leave clause unconstitutionally forces municipal taxpayers to subsidize public union political speech to which they object. That case is also before the Eighth Circuit.

Amici curiae Mountain States Legal Foundation is a nonprofit, public-interest law firm dedicated to bringing before the courts issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. Since its creation in 1977, MSLF attorneys have been active in litigation regarding the proper interpretation and application of statutory, regulatory, and constitutional provisions.

I. Introduction and Relevant Facts

Amici have long supported anti-SLAPP laws as a means to protect individuals, make victims whole, and promote judicial economy in the

face of frivolous attacks on First Amendment rights. Dismissal of this case, however, was a misapplication of the Texas Citizens Participation Act ("TCPA"), because there is no constitutional right to demand funding for the exercise of constitutional rights. It necessarily follows that because that demand cannot be made of the government, it likewise cannot be made of taxpayers via an anti-SLAPP law that expressly relies on constitutional rights. There is no exception or enhanced right of assembly for unions that could overcome this basic rule.

The underlying suit involves a challenge to a provision of the 2017-2022 collective bargaining agreement ("CBA") between the City of Austin ("City") and the Austin Firefighters Association, Local 975 ("AFA"), which provides paid leave ("release time") for City firefighters to do work for the AFA.[3] Taxpayer Plaintiffs challenged this provision as a violation of the gift clauses of the Texas Constitution, Article III, §§ 50, 51, 52-a, and Article XVI, § 6-a. The AFA moved to dismiss under the TCPA, CR.226–414 ("MTD"), which the district court granted in part, CR.1392.

[3] Facts drawn in their entirety from Brief for Plaintiffs/Appellants and Texas at x, 1–4, and 14–20.

As relevant here, the CBA provides that the AFA President may use release time "for any lawful Association business activities consistent with the Association's purposes," which means, among other uses, the City pays the AFA President for the time he spends opposing the City in contract negotiations and grievance proceedings. In addition, any "member of the bargaining unit may request to use [release time] as an 'other authorized representative'" for activities that directly support the mission of the AFA." The majority of release time used by other Authorized Association Representatives—75 percent—is spent on "other association business," which is a category of time for which no accounting is required and for which the AFA may determine how the time is spent.

Release time is used for political activities, such as attending AFA Political Action Committee meetings, determining which candidates to support or oppose, placing political candidate yard signs, producing written materials that provide AFA endorsement for or against political candidates, and lobbying.

These activities are relevant because the AFA characterized the underlying suit as "relat[ing] to the exercise of the right of association, which is the primary activity for which [release time] is used." MTD at 2.

That characterization provided the hook for the motion to dismiss under the TCPA. But Plaintiffs asserted no claim relating to AFA association or challenging any associational activity. Instead, they claim that gratuitous payments for release time violates the Texas Constitution. Federal constitutional law is clear that government is not required to fund constitutionally-protected activity to avoid infringing it. That limitation, which would preclude application of the TCPA to government actors, should likewise preclude application to private taxpayers whose obligations regarding the AFA's constitutional rights cannot be broader than the government's would be in similar circumstances.

The district court's reliance on an enhanced right of association vis-à-vis taxpayers—that would compel them to fund private association to avoid infringing it—was error. If the AFA cannot under the Constitution compel Texas to finance its self-interested activity, no more can it invoke the right of association to evade a taxpayer challenge to that financing.

II. *Amici* Support Application of Anti-SLAPP Laws Consistent with Their Text and Purpose.

Anti-SLAPP laws serve a critical role in preventing vexatious litigants from abusing the court system to harass, intimidate, and silence individuals exercising free speech rights. Without these laws, innocent

defendants—particularly those of lesser financial means—can face ruin through litigation costs, even if the underlying case is frivolous.

Anti-SLAPP laws provide several bulwarks against harassing suits. First, they allow quick dismissal coupled with a freeze of discovery. Oppressive discovery requests are one way that harmful litigants run up costs and make it impossible for individuals to affordably defend themselves in court. And long, drawn out cases can result in unnecessary emotional duress, increased attorneys' fees, and constant uncertainty. Second, Anti-SLAPP laws allow for fee shifting: if the defendant prevails on a special motion to dismiss, she can recover her fees and costs. This allows victims to be made whole, incentivizes attorneys to take cases, and encourages abusive plaintiffs think twice before filing suit. Finally, these laws promote judicial economy by keeping frivolous lawsuits out of the court system. For these benefits to be achieved, it is critical that courts apply anti-SLAPP laws to the situations for which they were intended.

The purpose of anti-SLAPP laws is to "protect citizens and organizations from civil lawsuits for exercising their rights of public participation in government." *Leiendecker v. Asian Women United of Minn.*, 848 N.W.2d 224, 228 (Minn. 2014) (quoting Act of May 5, 1994,

ch. 556, 1994 Minn. Laws 895, 895) (cleaned up). Consistently, anti-SLAPP laws protect "conduct or speech." *Id.* They do not protect a non-party's subsidy of speech. *See id.*

Amici are not aware of any anti-SLAPP law in the United States without a provision requiring, as a threshold issue, a causal connection between specific conduct or speech ***by the party defendant*** and the lawsuit challenging it.[4] Anti-SLAPP laws decidedly *do not* protect the subsidy of a party defendant's speech by a third party, where the speech itself could still take place without any threat or limitation whatsoever. In other words, "the mere fact an action was filed after protected activity took place does not mean it arose from that activity." *City of Cotati v. Cashman*, 52 P.3d 695, 700 (2002).

This is an important prerequisite that a public union cannot meet when challenging a taxpayer lawsuit against government subsidy as a

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[4] *See, e.g.,* "State Anti-SLAPP Laws," *Public Participation Project*, *available at* anti-slapp.org/your-states-free-speech-protection#reference-chart (last visited Dec. 1, 2021); Cal. Code Civ. Proc. § 425.16 ("in furtherance of the person's right of petition or free speech"); NY CLS Civ. R. § 76-a (any anti-SLAPP motion must be "based upon" a defendant's "communication" or "any other lawful conduct"); 735 Ill. Comp. Stat. Ann. 110/15 (only applicable where underlying lawsuit "is based on, relates to, or is in response to any act or acts of the moving party").

SLAPP suit. There is no causal connection between a lawsuit challenging the government's subsidy of union political speech using taxpayer dollars and that union's speech. Taken to its logical conclusion, allowing a subsidy recipient to stifle taxpayer challenges to its subsidy would render the United States Supreme Court's forced subsidy doctrine a practical nullity. *E.g., United States v. United Foods*, 533 U.S. 405 (2001). In *United Foods*, as just one example, mushroom growers brought a lawsuit to stop a forced subsidy from the growers to the mushroom growers' council. *Id.* at 408. The Supreme Court struck down that subsidy because it violated the First Amendment. *Id.* at 408–16. Should the mushroom growers' council have had an anti-SLAPP claim against the growers? Surely not. Similarly, the Supreme Court's *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, decision from 2018 would have no teeth if employees who seek to stop forced subsidy of union political activity were subject to anti-SLAPP laws for challenging those subsidies and protecting their own constitutional rights. *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018).

But for anti-SLAPP laws to be successful—and for other states to emulate Texas's excellent model—they must be applied properly. When

well-heeled litigants try to twist Anti-SLAPPs to disrupt otherwise reasonable lawsuits that have *nothing* to do with abusive attempts to silence speech, they gut the effectiveness of Anti-SLAPP enforcement. Instead, they weaponize it for their own ends and blow past the limitations of the plain text of the statute. For Anti-SLAPP laws to continue to protect individuals, make victims whole, and promote judicial economy, they must be fairly applied *only* when frivolous suits infringe on First Amendment rights.

III. The Rights of Speech, Petition, and Association Limit Government Authority and any Analogous Application to Private Parties Must be Congruent in Scope.

The First Amendment protects the rights to speak freely, to advocate ideas, to associate with others, and to petition the government for redress of grievances. *Smith v. Arkansas State Highway Emp., Loc. 1315*, 441 U.S. 463, 464 (1979). These protections intercede between the government and individuals, or associations advocating on their behalf. *Id.* at 464 (collecting cases) ("The government is prohibited from infringing upon these guarantees"). The purpose of the TCPA, to "encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law," Tex. Civ. Prac. & Rem. Code

Ann. § 27.002, invokes specific constitutional rights and any claims of constitutional infringement under the TCPA must likewise conform to the contours of its namesake constitutional rights.

As relevant here, the First Amendment protects against infringement of rights by the government but creates no positive rights requiring government to facilitate or fund their exercise. Nor does it create enhanced rights for unions or any other special form of association, nor support the notion of "indirect" infringement as a means to expand the rights of one party to displace the analogous rights of others. Thus, any First Amendment rights the union asserts against the taxpayers here are limited to rights it could assert against the government—and not an enhanced, indirect, or positive right that would not be recognized were the union and the state the only parties to the suit.

A. There is No Enhanced Right to Union Association Beyond the Scope of Associational Rights in the Non-Union Context.

The union moved to dismiss the taxpayers' gift clause challenge on the basis that release time "relates to the exercise of the right of association, which is the primary activity for which [it] is used." MTD at 2. But the taxpayers' challenge is not to union association but to whether the City, under the gift clause prohibition, may pay for it without receiving value

in return. Thus, the union's argument that it must be paid for exercising its associational rights would only makes sense if it could locate a special or enhanced constitutional right to receive taxpayer funds for associating, which the ordinary person—who does not "associate" on the government's dime—is not entitled to receive.

The notion of a special or enhanced right to associate in the union context has been rebuffed by the Supreme Court. In *Lincoln Federal Labor Union No. 19129, v. Northwestern Iron & Metal Co*. the Court stated, in denying a union challenge to a right to work law:

> There cannot be wrung from a constitutional right of workers to assemble to discuss improvement of their own working standards, a further constitutional right to drive from remunerative employment all other persons who will not or can not, participate in union assemblies. . . . For where conduct affects the interests of other individuals and the general public, the legality of that conduct must be measured by whether the conduct conforms to valid law, even though the conduct is engaged in pursuant to plans of an assembly.

335 U.S. 525, 531 (1949). So too here, where the lawsuit challenges the legality of government payment for release time under the TCPA. The plaintiff's theory of liability cannot be displaced by defendant's hypothesis that funding is indistinguishable from union activity itself. Thus, while "[t]here is no doubt that union workers enjoy valuable rights

of association and assembly that are protected by the First Amendment. . . . that right alone cannot operate as an offensive weapon to wrest rights from others:" *Sweeney v. Pence*, 767 F.3d 654, 670 (7th Cir. 2014). As in *Lyng v. Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW*, the gift clause challenge does not "infringe the associational rights of appellee individuals and their unions," "directly and substantially interfere with [the union's] ability to associate," "order [the union] not to associate together for the purpose of conducting a strike, or for any other purpose," or "prevent them from associating together or burden their ability to do so in any significant manner." 485 U.S. 360, 366 (1988) (internal quotations omitted). It merely alleges unlawful funding of otherwise lawful activity.

Indeed, *Lyng*, is illustrative of the type of financial interest the Supreme Court has found insufficient to support a claim of associational infringement. In *Lyng*, the federal government refused to extend food stamp benefits to union members who, because they were on strike, were without their wage income. *Id.* at 368. The Court held that while "[d]enying such benefits makes it harder for strikers to maintain themselves and their families during the strike and exerts pressure on

them to abandon their union," and "[s]trikers and their union would be much better off if food stamps were available," "the strikers' right of association does not require the Government to furnish funds to maximize the exercise of that right." *Id.* The perils identified in *Lyng* have no parallel here where there is no peril to union members.

Thus, when the Court held in *Lyng* that "[e]xercising the right to strike inevitably risks economic hardship, but we are not inclined to hold that the right of association requires the Government to minimize that result by qualifying the striker for food stamps," *Lyng*, 485 U.S. at 368, that rejection of enhanced First Amendment rights—entitling the union to financial support for exercising its rights even in the face of actual financial risks—must foreclose union-specific enhanced associational rights in lesser scenarios like here.

B. The Supreme Court Has Rejected the Theory of Indirect Infringement to Expand Associational Claims.

The AFA makes no allegation that the TCPA challenge directly infringes its associational rights in any way that would trigger a viable constitutional claim. It does not allege, for example, that without government funding of release time it would cease to exist, its members could not communicate with each other, its members or the organization

itself would be exposed to legal liability, or it would suffer any identifiable burden that would directly preclude its viability as an organization. Instead, the gist of the AFA's motion is that release time expands the union's opportunity to associate and thus the indirect effect of any challenge to paying for this enhanced association is the equivalent of infringing association itself.

The Supreme Court has rejected the notion that First Amendment rights are infringed by the indirect effects of, for example, refusing to curtail the rights of others even if doing so would enhance the impact of union association. In *Lincoln Fed. Lab. Union No. 19129, A.F. of L. v. Nw. Iron & Metal Co.*, the Supreme Court addressed a union's claim that state laws requiring employers to give equal work opportunities to union and non-union members violated the union's rights to speech and assembly. The union's claim was based on a multi-stage argument that, (1) "without a right of union members to refuse to work with non-union members, there are 'no means of eliminating the competition of the non-union worker,'" and (2) "since, . . . a 'closed shop' is indispensable to achievement of sufficient union membership to put unions and employers on a full equality for collective bargaining," then (3) "a closed shop is consequently

'an indispensable concomitant' of 'the right of employees to assemble into and associate together through labor organizations." 335 U.S. 525, 529–31 (1949). The Court rejected their "contention . . . that these state laws indirectly infringe their constitutional rights of speech, assembly, and petition." *Id*. at 530.

So too here, where the AFA's argument that challenging the *gratis* funding of release time is "related to" an associational right. Because there is no direct right to be paid for associating, even if release time can be used to facilitate association, such an indirect effect cannot implicate a right that could trigger the TCPA.

IV. The Government Is Not Required to Fund Exercise of a Right to Avoid Infringing It.

It is well-established that government is not required to fund the exercise of a constitutional right to avoid infringing it and may choose to promote the exercise of certain rights without being compelled to promote others. This rule applies across the spectrum of rights. For example, in addition to upholding the constitutionality of denying food stamps to union members while striking, *Lyng,* 485 U.S. 360, the Supreme Court has held that government may fund medical expenses relating to childbirth but not expenses relating to abortion, *Harris v. McRae*, 448

U.S. 297, 315 (1980). The distinction between providing funding to support one activity versus another activity—regardless of constitutional status—flows from the power of the government to choose how to spend money.

Under the Spending Clause, Congress may "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." Art. I, § 8, cl. 1. The Supreme Court has interpreted this clause to mean the Constitution "provides Congress broad discretion to tax and spend for the 'general Welfare,' including by funding particular state or private programs or activities." *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013). This power includes certain corollaries, such as the power to impose limits on the use of funds, *Rust v. Sullivan*, 500 U.S. 173, 195, n. 4, (1991) ("Congress' power to allocate funds for public purposes includes an ancillary power to ensure that those funds are properly applied to the prescribed use.") and the power to fund certain activities but not others. *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 540 (1983) (upholding a requirement that nonprofit organizations seeking tax-exempt status under 26 U.S.C.

§ 501(c)(3) not engage in substantial efforts to influence legislation because Congress had merely "chosen not to subsidize lobbying.") (cleaned up). *See also, United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 212 (2003) (plurality opinion) (rejecting a claim by public libraries that conditioning funds for internet access on the libraries' installing filtering software violated their First Amendment rights, explaining that "[t]o the extent that libraries wish to offer unfiltered access, they are free to do so without federal assistance.").

There are limitations on the government's discretion in determining who or what may be excluded by a funding program. First, a funding mechanism may not be leveraged to limit constitutional rights beyond the scope of the program. For example, in *FCC v. League of Women Voters of California*, the Court struck down a condition on federal financial assistance to noncommercial broadcast television and radio stations that prohibited all editorializing, including with private funds, because the law provided no way for a station to limit its use of federal funds to noneditorializing activities while using private funds to express its views on matters of public importance; thus, the condition regulated speech outside the scope of the program. 468 U.S. 364, 399–401 (1984).

Second, the government cannot condition receipt of a benefit on foregoing the exercise of a constitutional right. For example, government may not condition receipt of an important benefit upon conduct proscribed by a religious faith, or deny a benefit because of conduct mandated by religious belief, *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 717-718 (1981); nor "exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Nonbelievers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation," *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947). These limitations are distinct from and independent of the claimed, but non-existent, requirement that exercise of a right must be subsidized or enhanced. Indeed, the mere refusal to subsidize a right "places no governmental obstacle in the path" of exercising that right. *Harris*, 448 U.S. at 315; *accord Taxation With Representation*, 461 U.S. at 549–50.

Claims that government must subsidize a First Amendment right to avoid infringing it, though not uncommon, have been consistently rebuffed by the Supreme Court regardless of the clause invoked. In the speech context, the Court has held that regulations prohibiting abortion

counseling and referral while operating within a federally-funded family planning program did not violate the providers' speech rights. *Rust*, 500 U.S. at 193–94. This is so because "[w]hile in some contexts the government must accommodate expression, it is not required to assist others in funding the expression of particular ideas, including political ones." *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 358 (2009) (citing *Taxation With Representation of Wash.*, 461 U.S. at 549 (A "legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny"). *Accord Buckley v. Valeo*, 424 U.S. 1, 97–99 (1976) (upholding a statute providing federal funds for candidates for public office who enter primary campaigns, but not for candidates who do not run in party primaries); *Cammarano v. United States*, 358 U.S. 498, 499–500, 513 (1959) (upholding a Treasury Regulation that denied business expense deductions for lobbying activities).

In the union context, the Supreme Court has held that the First Amendment does not require the government to facilitate union activity to comport with the Constitution. For example, in *Ysursa*, the issue was Idaho law that allowed public employees to elect to have their employer

deduct a portion of their wages and remit it to the union to pay union dues. The employees could not, however, have an amount deducted and remitted to the union's political action committee, because Idaho law prohibited payroll deductions for political activities. 555 U.S. at 355. A group of unions representing Idaho public employees challenged this limitation as a violation of their First Amendment rights. The Court disagreed, holding the "First Amendment prohibits government from 'abridging the freedom of speech'; it does not confer an affirmative right to use government payroll mechanisms for the purpose of obtaining funds for expression." *Id*. Thus, even though Idaho did not dispute that "unions face substantial difficulties in collecting funds for political speech without using payroll deductions," and "publicly administered payroll deductions for political purposes can enhance the unions' exercise of First Amendment rights," Idaho's decision not to assist the unions in their political activities was not "an abridgment of the unions' speech." *Ysursa*, 555 U.S. at 3. The unions remained "free to engage in such speech as they see fit. They simply [were] barred from enlisting the State in support of that endeavor." *Id*.

So too here, where there is no constitutional compulsion for Texas to subsidize union release time to facilitate associational activities.

The issue in this case, of course, is not whether Texas must fund release time, but rather, whether such funding is consistent with the Texas Constitution. Resolution will turn on a question that the lower court apparently did not reach: application of the Gift Clauses to release time funding. The TCPA cannot be used to shield that question from review by imposing a constitutional burden on taxpayers that could not be imposed on the state. Afterall, if "[t]he government's decision not to subsidize the exercise of a fundamental right does not infringe the right," *Taxation With Representation*, 461 U.S. at 549, then how could a private taxpayer infringe the right by challenging funding that—at most—has an indirect effect on it?

V. Conclusion.

The Court should reverse the lower court's grant of the motion to dismiss and grant of fees.

Respectfully submitted,

January 4, 2022

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