NO. D-1GN16004307

MARK PULLIAM AND JAY WILEY	§	IN THE DISTRICT COURT OF
	§	
Plaintiffs,	§	
	§	
and	§	
	§	
TEXAS,	§	
	§	
Intervenor,	§	
	§	TRAVIS COUNTY, TEXAS
v.	§	
	§	
CITY OF AUSTIN, TEXAS; MARC A. OTT, IN HIS OFFICIAL CAPACITY AS CITY MANAGER OF THE CITY OF AUSTIN; AND AUSTIN FIREFIGHTERS ASSOCIATION LOCAL 975,	§	
	§	
Defendants.	§	419th JUDICIAL DISTRICT

PLEA IN INTERVENTION OF TEXAS

Texas intervenes under Rule 60 of the Texas Rules of Civil Procedure to protect the constitutional rights of taxpayers. Texas is concerned that the collective bargaining agreement at issue contains the payment of public monies for private political activities in violation of the Texas Constitution.

I. Background.

The City of Austin ("City") is party to a collective bargaining agreement ("CBA") with the Austin Firefighters Association Local 975 ("Union"). *See* Ex. 1. Under the CBA, the City uses taxpayers' money to pay firefighters to take time off from their public safety duties to conduct, *inter alia*, the Union's political business.

Ex. 1 at Art. 10, § 1.A. The CBA designates this paid time off as "Association Business Leave," which is known commonly as "release time."

The CBA places few restrictions on what Union officials may do during release time, and expressly permits Union politicking. The Union president "may use [release time] for *any* lawful *Association business* activities consistent with the Association's purposes." *Id.* § 1.B.2 (emphasis added). Other authorized Union members may use release time for *Union business* activities, which the CBA defines as collective bargaining, adjudicating grievances, and attending union conferences, among other things. *Id.* § 1.B.2.

Union business activities include political activity. *Id.* While Union members may not use release time for state or national political activity generally, the CBA specifically authorizes release time for political activities related to "wages, rates of pay, hours of employment, or condition of work affecting the members" of the Union. *Id.* Moreover, at the local level, release time may be used for political activity related to firefighter safety. *Id.*

Each year, the City gives the Union a pool of 5,600 taxpayer-funded release time hours that public servants may use for Union business, including political activity. *Id.* § 2.A. This pool of hours may increase to 6,600 hours. *Id.* § 2.B. From this pool, the Union president may use up to 2,080 taxpayer-funded release time hours for any lawful Union business, including, but not limited to, political activity. *Id.* § 2.C. Thus, the taxpayers pay approximately three full-time firefighters each year to do nothing but engage in *Union business*, including partisan political activity.

Making matters worse, the City requires little accounting of how Union members use release time, meaning that the City and taxpayers have no way to hold their employees accountable for the expenditure of public funds. The CBA simply requires that Union members make a written request to use release time, *id.* § 1.C,

instructs the fire chief to approve these requests, subject to the operational needs of the Fire Department (*i.e.*, emergencies), *id*. § 1.D, and requires the City and Union to track the usage, *id*. § 2.A. At no point must the City demonstrate that the Union is using release time to benefit the City's interests, or those of the public as a whole.

By giving taxpayer money to a public employees union, a political organization by definition, so that its members may engage in political activity for their own private benefit, the City's actions and the CBA itself raise significant questions under the Texas Constitution. Thus, Texas intervenes.

II. Standard for Intervention.

Texas Rule of Civil Procedure 60 provides that "[a]ny party may intervene by filing a pleading, subject to being stricken out by the court for sufficient cause on the motion of any party." TEX. R. CIV. P. 60. "Rule 60 . . . provides . . . that any party may intervene" in litigation in which they have a sufficient interest. *Mendez v. Brewer*, 626 S.W.2d 498, 499 (Tex. 1982). "A party has a justiciable interest in a lawsuit, and thus a right to intervene, when his interests will be affected by the litigation." *Jabri v. Alsayyed*, 145 S.W.3d 660, 672 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (citing *Law Offices of Windle Turley v. Ghiasinejad*, 109 S.W.3d 68, 71 (Tex. App.—Fort Worth 2003, no pet.)). And an intervenor is not required to secure a court's permission to intervene in a cause of action, or prove that it has standing. *See Guar. Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 657 (Tex. 1990).

Under the Texas Constitution, the Attorney General may intervene for Texas to "take such action in the courts as may be proper and necessary to prevent any private corporation from . . . demanding or collecting any species of taxes . . . not authorized by law." TEX. CONST. art. IV, § 22; *see Texas v. Farmers' Loan & Tr. Co.*, 81 Tex. 530, 547–48 (1891) ("it is not only the right but the duty of the attorney general to institute and maintain, in behalf of the state, all such suits as may be

necessary to prevent the abuse of its franchise by any private corporation, for the demanding and collecting of taxes . . . ."); *Texas v. Thomas*, 766 S.W.2d 217, 218–19 (Tex. 1989) (holding the Attorney General has the power to intervene even in commission proceedings).

There is no pre-judgment deadline for intervention. *Tex. Mut. Ins. Co. v. Ledbetter*, 251 S.W.3d 31, 36 (Tex. 2008) (citing TEX. R. CIV. P. 60; *Citizens State Bank of Sealy v. Caney Invs.*, 746 S.W.2d 477, 478 (Tex. 1988)). Texas courts recognize an "expansive" intervention doctrine in which a plea in intervention may be untimely only if it is "filed after judgment," *Texas v. Naylor*, 466 S.W.3d 783, 788 (Tex. 2015) (quoting *First Alief Bank v. White*, 682 S.W.2d 251, 252 (Tex. 1984)), though even post-judgment interventions are permissible under certain circumstances. *Ledbetter*, 251 S.W.3d at 36 (citing *In re Lumbermens Mut. Cas. Co.*, 184 S.W.3d 718, 725–26 (Tex. 2006)). There is no final judgment in this case. Texas's intervention is timely.

III. Texas Has an Interest in Prohibiting the Use of Public Funds for Private Political Activity.

Texas avers that the CBA violates the Gift Clauses of the Texas Constitution by giving public money to a political organization without serving a public purpose, retaining clear public control, or providing a clear public benefit. Public employee unions, like the Union here, are political in nature and engage in political activity. When an entity is political, in whole or part, then the presumption must be that its purposes and actions do not benefit the public *as a whole*, and any grant of public money to such an organization violates the Constitution's prohibition against gifts to private entities. Thus, the City's agreement to pay firefighters for time spent on Union political activities does not benefit the public as a whole and violates the Texas Constitution.

A. The Texas Constitution Prohibits Gratuitous Gifts of Public Funds to Private Political Organizations.

The Texas Constitution prohibits the collection or expenditure of public money for anything other than public purposes. "Taxes shall be levied and collected by general laws and for public purposes." TEX. CONST. art. VIII, § 3. "No appropriation for private or individual purposes shall be made, unless authorized by this Constitution." TEX. CONST. art. XVI, § 6.

Sections 50, 51, and 52 of Article III provide that neither the legislature nor any county, city, town, or other political subdivision may grant public money to any individual, association of individuals, or corporation. *See* TEX. CONST. art. III, § 50 ("The Legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the State in aid of, or to any person, association or corporation, whether municipal or other. . . ."); TEX. CONST. art. III, § 51 ("The Legislature shall have no power to make any grant or authorize the making of any grant of public moneys to any individual, association of individuals, municipal or other corporations whatsoever. . . ."); TEX. CONST. art. III, § 52 ("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. . . .").

The Texas Supreme Court has found that the purposes of article III, sections 51 and 52 and article XVI, section 6 are to prevent the gratuitous grant of public funds to any individual or corporation. *See Tex. Mun. League Intergovernmental Risk Pool v. Tex. Workers' Comp. Comm'n*, 74 S.W.3d 377, 383 (Tex. 2002) ("We have held that section 52(a)'s prohibiting the Legislature from authorizing a political subdivision 'to grant public money' means that the Legislature cannot require *gratuitous* payments to individuals, associations, or corporations.") (emphasis in original); *Texas v. City of Austin*, 160 Tex. 348, 355 (1960) (finding the purposes of

article III, section 51 and article XVI is "to prevent the gratuitous grant of [public] funds to any individual or corporation whatsoever").

Grants of public money are not "gratuitous" "so long as the statute requiring such payments: (1) serves a legitimate public purpose; and (2) affords a clear public benefit received in return." *Tex. Mun. League*, 74 S.W.3d at 383; *see also id.* ("A political subdivision's paying public money is not 'gratuitous' if the political subdivision receives return consideration.") (citing *Key v. Comm'rs Ct. of Marion Cty.*, 727 S.W.2d 667, 668 (Tex. App.—Texarkana 1987, no writ)); *Brazoria Cty. v. Perry*, 537 S.W.2d 89, 90–91 (Tex. App.—Houston [1st Dist.] 1976, no writ) ("The Constitution does not, however, invalidate an expenditure which incidentally benefits a private interest if it is made for the direct accomplishment of a legitimate public purpose.") (citations omitted); Tex. Att'y Gen. Op. No. MW-89 (1979) (citing Tex. Att'y Gen. Op. No. H-1309 (1978)) ("These constitutional provisions [art. III, §§ 51 & 52 and art. XVI, § 6] prohibit the grant of public funds or benefits to any association unless the transfer serves a public purpose and adequate contractual or other controls ensure its realization."). The CBA's release time provisions do not serve a public purpose, lack public control, and fail to provide a public benefit.

B. A Public Purpose or Benefit Does Not Include Political Activity by a Private Organization.

The Texas Supreme Court uses a three-part test to determine if a statute or governmental action accomplishes a public purpose under article III, section 52 of the Constitution. First, courts must "ensure that the statute's predominant purpose is to accomplish a public purpose, not to benefit private parties." *Tex. Mun. League*, 74 S.W.3d at 384. Second, the law at issue must "retain public control over the funds to ensure that the public purpose is accomplished and to protect the public's investment." *Id.* And, third, the courts must "ensure that the political subdivision receives a return benefit." *Id.*

In Texas, a public purpose has never been defined to include political activity by a private organization. *See Davis v. City of Taylor*, 123 Tex. 39, 43 (1934). Rather, a public purpose is fulfilled when taxpayer monies are spent to purchase property by condemnation to eradicate poor living conditions. *Davis v. City of Lubbock*, 160 Tex. 38, 52 (1959). A public purpose is fulfilled when taxpayer monies are expended to reimburse individuals injured by the negligence of public employees. *Harris Cty. v. Dowlearn*, 489 S.W.2d 140, 144 (Tex. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.), *disapproved of on other grounds, Tex. Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235 (Tex. 1992). The relocation of private utility facilities due to interstate highway improvements serves a public purpose, *City of Austin*, 160 Tex. at 358, and a city furnishing a right of way for relocation of part of a private railroad line is a legitimate public purpose, *Barrington v. Cokinos*, 161 Tex. 136, 146 (1960). Even the enactment of a pension fund to compensate former public employees serves a public purpose. *Byrd v. City of Dallas*, 118 Tex. 28, 35 (1928).

By contrast, in *Texas Pharmaceutical Association v. Dooley*, it was held that the unconditional appropriation of state funds to a private professional association violated article III, section 51 as an unconstitutional gift. *See* 90 S.W.2d 328, 330 (Tex. Civ. App.—Austin 1936, no writ) ("if these fees provided for in section 14 above quoted and appropriated to appellant [professional association] be considered as not reasonably necessary for the Board of Pharmacy to discharge its duties under the law and to enforce the same, but as levied for purposes of revenue, then clearly we think they become public funds or public moneys, . . . and the attempted grant thereof to appellant private corporation is in clear violation of section 51, art. 3 of the Constitution."); *see also* Tex. Att'y Gen. Op. KP-0112 (2016) (finding that assuming the liability of municipal retirement system shortfall would constitute an unconstitutional gift in violation of article III, section 50).

The only instance in which Texas courts have sanctioned payment of state funds to a private political organization is so that primary elections may be held. These expenditures, for all "major part[ies]," serve a public purpose because political primaries are "a unitary portion of the electoral process directed by state law" that benefit the public as a whole. *Bullock v. Calvert*, 480 S.W.2d 367, 370 (Tex. 1972); *see also Campbell v. Davenport*, 362 F.2d 624, 629 (5th Cir. 1966) (noting "Texas has delegated its function of conducting primaries to the political parties and that in this respect 'the party's action (is) the action of the state.'"). Since "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live," *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964), the expenditure of public monies to secure that right undoubtedly fulfills a public purpose. Such an investment, however, is a far cry from the circumstances presented in the case *sub judice*.

C. The CBA Gives Union Members Release Time to Conduct Political Activities that Serve No Public Purpose and Provide No Public Benefit.

Granting public funds to private political entities is not a legitimate public purpose. In addition, the CBA does not retain public control over the partisan activities of the Union, and the release time does not benefit all the inhabitants of the City. *Tex. Mun. League*, 74 S.W.3d at 384. As the Supreme Court of Ohio put it, "[g]enerally, a public purpose has for its objectives the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents within the municipal corporation . . . ." *State ex rel. McClure v. Hagerman*, 98 N.E.2d 835, 838 (Ohio 1951).

The Union is a political organization charged with protecting the interests of its members. "There can be no quarrel with the truism that because public employee unions attempt to influence governmental policymaking, their activities and the

views of members who disagree with them may be properly termed political." *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977). Indeed, even if the Union limited its activities to just collective bargaining with the City, those activities "have powerful political and civic consequences." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2289 (2012).

But here the CBA does not cabin the Union's political activity to collective bargaining. By its terms, the CBA authorizes the Union president to use release time for Union business. Ex. 1 § 1.B.1. It also authorizes Union members to use release time for political activities. *See id.* § 1.B.2 ("It is specifically understood and agreed that [release time] shall not be utilized for legislative and/or political activities at the State or 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 [release time] for legislative and/or political activities shall be limited to raising concerns regarding firefighter safety*.") (emphasis added).

Nor does the Union itself cabin its political activity to collective bargaining. The Union utilizes a political action committee,[1] supports and opposes proposed laws,[2] and regularly endorses candidates for office—including City Council members.[3]

Furthermore, the very concept of a municipality giving public employees *any* release time to work on *any* union activities is highly suspect.

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[1] *See* Austin Firefighters Association Local 975, PAC Board Members, http://iafflocal975.org/index.cfm?Section=10&pagenum=247&titles=0.

[2] *See* Austin Firefighters Association Local 975, Politics & Legislation, http://iafflocal975.org/index.cfm?Section=10&pagenum=18&titles=0; 1st Annual Austin, San Antonio & Laredo Public Safety Network Legislative Party, at http://iafflocal975.org/index.cfm?Section=10&pagenum=269&titles=0.

[3] *See*, *e.g.*, Andy Jechow, *Austin firefighters union endorses 5 council members*, KXAN.com, June 24, 2016, http://kxan.com/2016/06/23/austin-firefighters-union-endorses-5-council-members/; William Hughes, *Austin Firefighter Association Endorses Brigid*, VoteForBrigid.com, Dec. 11, 2013, http://www.voteforbrigid.com/austin_firefighters_association_endorses_brigid.

> There is certainly a vast difference between a case where public money is granted to municipal or political corporation on condition that it assume the unqualified burden and duty of using it for a governmental function and a case like this, where the grant of public money is made under such circumstances that not one cent of it can ever be used in performing governmental function.

Rd. Dist. No. 4, Shelby Cty. v. Allred, 123 Tex. 77, 91 (Comm'n App. 1934, op. adopted).

In 1979, the Texas Commissioner of Education asked the Attorney General whether the Fort Worth Independent School District may allow certain private professional organizations to use school personnel during working hours to pursue the business of the organizations. Tex. Att'y Gen. Op. No. MW-89 (1979). The school district, like the Union here, granted school employees release time to work for these organizations. The Attorney General concluded that article III, sections 51 and 52 and article XVI, section 6 of the Texas Constitution prohibited the school district's release time program because the district "neither articulated a public purpose to be served by the released time program nor placed adequate controls on the use of released time to insure that a public purpose will be served." *Id*.

Indeed, the strength of the Gift Clauses prohibition on using public money for private purposes can be seen through a question submitted to the Attorney General by the Fort Bend County Attorney. Tex. Att'y Gen. LO-97-077 (1997). There, a county clerk running for office in the County and District Clerk's Association used the county's postage meter to mail campaign materials. The Attorney General concluded that even this slight expenditure of public funds violated article III, section 52 because it did not serve a public purpose.

The City's gift of release time to Union members to conduct Union activity fails to serve a legitimate public purpose and lacks the controls necessary to ensure that public funds are being used to benefit the public as a whole. If a county clerk may not

even use county postage to mail a few campaign letters for his candidacy in a professional association, Tex. Att'y Gen. LO-97-077 (1997), certainly the City cannot pay approximately three full-time firefighters to engage in the political activity of their Union without running afoul of the Constitution.

IV. Conclusion.

The City's release time agreement with the Union violates article III, sections 50, 51, and 52, article VIII, section 3, and article XVI, section 6 of the Texas Constitution by giving public money to a private political organization without adequate controls or any requirement that the City or Union demonstrate the release time benefits the public as a whole. Texas requests notice and appearance, and the opportunity to defend the rule of law. If the release time is an unconstitutional gift under the Texas Constitution, the Court should enter a permanent injunction prohibiting the City, its officials, and the Union from enforcing Article 10 of the CBA until such time as a proper release time scheme is implemented. Texas also prays for all other and further relief that this Court may deem proper in law or equity.[4]

[4] *See, e.g.*, *Yett v. Cook*, 281 S.W. 837, 843 (Tex. 1926) ("[U]nder the common law, by which our Constitution and statutes are to be interpreted, the state could forfeit municipal charters for misconduct of their officers.").

Respectfully submitted on this the 18th Day of October, 2016,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading has been served on all counsel of record or unrepresented parties on this 18th day of October, 2016, in accordance with Rule 21a of the Texas Rules of Civil Procedure, electronically through the electronic filing manager or by certified registered U.S. Mail.

/s/ Michael C. Toth
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