

NO. 2017-36216

HOUSTON FIREFIGHTERS' RELIEF  
AND RETIREMENT FUND

Plaintiff,

VS.

CITY OF HOUSTON, SYLVESTER  
TURNER, KELLY DOWE, CHRIS B.  
BROWN, BRENDA STARDIG, JERRY  
DAVIS, ELLEN COHEN, DWIGHT  
BOYKINS, DAVE MARTIN, STEVE LE,  
GREG TRAVIS, KARLA CISNEROS,  
ROBERT GALLEGOS, MIKE LASTER,  
LARRY GREEN, MIKE KNOX,  
DAVID ROBINSON, MICHAEL  
KUBOSH, AMANDA EDWARDS,  
AND JACK CHRISTIE

Defendants.

IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

190TH JUDICIAL DISTRICT

**PLAINTIFF HOUSTON FIREFIGHTERS' RELIEF AND RETIREMENT FUND'S  
FIRST AMENDED PETITION AND APPLICATION FOR TEMPORARY  
AND PERMANENT INJUNCTION**

Plaintiff Houston Firefighters' Relief and Retirement Fund (the "Fund") files this First Amended Petition and Application for Temporary and Permanent Injunction against Defendants The City of Houston (the "City") and the following City officials each sued only in his or her official capacity: Mayor Sylvester Turner, Finance Department Director Kelly Dowe, City Controller Chris B. Brown, and Council Members Brenda Stardig, Jerry Davis, Ellen Cohen, Dwight Boykins, Dave Martin, Steve Le, Greg Travis, Karla Cisneros, Robert Gallegos, Mike Laster, Larry Green, Mike Knox, David Robinson, Michael Kubosh, Amanda Edwards, and Jack Christie.

Created in 1937, the Fund is a public pension system whose membership consists of more than 6,600 active and retired firefighters (collectively referred to as "Firefighters"), as well as the

surviving spouses and children of Firefighters. The Fund is authorized and governed by the Texas Constitution and Texas Revised Civil Statutes Art. 6243e.2(1) (hereinafter, "Article 6243e.2(1)"). The Fund provides retirement, disability, and survivor benefits to eligible Firefighters. The Fund is critically important to Firefighters and their families because Firefighters do not participate in the U.S. Social Security system through their work for the City of Houston.

As further discussed below, Article XVI, Section 67 of the Texas Constitution vests in the Fund the sole authority and discretion to "select legal counsel and an actuary and adopt sound actuarial assumptions to be used by the system or program." Despite this clear constitutional directive, the Texas Legislature passed, and Governor Abbott has signed, Senate Bill 2190 ("SB 2190"), which will take effect on July 1, 2017. SB 2190 fixes an initial assumed rate of return at 7% and purports to grant authority, in part, to the City and the City's actuary to determine other actuarial assumptions, including future assumed rates of return. By doing so, it directly violates the Texas Constitution's directive that the adoption of actuarial assumptions is the sole purview of the Fund. SB 2190 also purports to require the Fund to take actions in accordance with its unconstitutional scheme even before it becomes effective on July 1, 2017.

## **I. DISCOVERY CONTROL PLAN**

1. Any discovery in this case should be conducted under Level 3 of Texas Rule of Civil Procedure 190.4.

## **II. PARTIES**

2. Plaintiff Houston Firefighters' Relief and Retirement Fund is a public pension system that provides retirement, disability, and survivor benefits to eligible Firefighters. The Fund is located at 4225 Interwood North Parkway, Houston, Texas 77032-3866.

3. Defendant City of Houston is located in Harris County, Texas, and may be served with process by serving City Secretary Anna Russell, City Hall Annex, 900 Bagby, First Floor, Houston, Texas 77002. Pursuant to a Rule 11 agreement, the City Attorney's office has agreed to answer for the City without the need for service of process.

4. Defendant Sylvester Turner is Mayor of the City and a resident of Harris County, Texas. He may be served with process at his place of business, City Hall Annex, 900 Bagby, First Floor, Houston, Texas 77002. Pursuant to a Rule 11 agreement, the City Attorney's office has agreed to answer for Mayor Turner without the need for service of process.

5. Defendant Kelly Dowe is the City's Director of the City Finance Department and a resident of Harris County, Texas. He may be served with process at his place of business, City Hall Annex, 900 Bagby, First Floor, Houston, Texas 77002. Pursuant to a Rule 11 agreement, the City Attorney's office has agreed to answer for Kelly Dowe without the need for service of process.

6. Defendant Chris B. Brown is the City's Controller and a resident of Harris County, Texas. He may be served with process at his place of business, City Hall Annex, 900 Bagby, First Floor, Houston, Texas 77002. Pursuant to a Rule 11 agreement, the City Attorney's office has agreed to answer for Chris Brown without the need for service of process.

7. Defendant Brenda Stardig is a City Council Member, Position District A, and a resident of Harris County, Texas. She may be served with process at her place of business, City Hall Annex, 900 Bagby, First Floor, Houston, Texas 77002. Pursuant to a Rule 11 agreement, the City Attorney's office has agreed to answer for Brenda Stardig without the need for service of process.

8. Defendant Jerry Davis is a City Council Member, Position District B, and a resident of Harris County, Texas. He may be served with process at his place of business, City Hall Annex,

900 Bagby, First Floor, Houston, Texas 77002. Pursuant to a Rule 11 agreement, the City Attorney's office has agreed to answer for Jerry Davis without the need for service of process.

9. Defendant Ellen Cohen is a City Council Member, Position District C, and a resident of Harris County, Texas. She may be served with process at her place of business, City Hall Annex, 900 Bagby, First Floor, Houston, Texas 77002. Pursuant to a Rule 11 agreement, the City Attorney's office has agreed to answer for Ellen Cohen without the need for service of process.

10. Defendant Dwight Boykins is a City Council Member, Position District D, and a resident of Harris County, Texas. He may be served with process at his place of business, City Hall Annex, 900 Bagby, First Floor, Houston, Texas 77002. Pursuant to a Rule 11 agreement, the City Attorney's office has agreed to answer for Dwight Boykins without the need for service of process.

11. Defendant Dave Martin is a City Council Member, Position District E, and a resident of Harris County, Texas. He may be served with process at his place of business, City Hall Annex, 900 Bagby, First Floor, Houston, Texas 77002. Pursuant to a Rule 11 agreement, the City Attorney's office has agreed to answer for Dave Martin without the need for service of process.

12. Defendant Steve Le is a City Council Member, Position District F, and a resident of Harris County, Texas. He may be served with process at his place of business, City Hall Annex, 900 Bagby, First Floor, Houston, Texas 77002. Pursuant to a Rule 11 agreement, the City Attorney's office has agreed to answer for Steve Le without the need for service of process.

13. Defendant Greg Travis is a City Council Member, Position District G, and a resident of Harris County, Texas. He may be served with process at his place of business, City Hall Annex, 900 Bagby, First Floor, Houston, Texas 77002.

14. Defendant Karla Cisneros is a City Council Member, Position District H, and a resident of Harris County, Texas. She may be served with process at her place of business, City Hall Annex, 900 Bagby, First Floor, Houston, Texas 77002. Pursuant to a Rule 11 agreement, the City Attorney's office has agreed to answer for Karla Cisneros without the need for service of process.

15. Defendant Robert Gallegos is a City Council Member, Position District I, and a resident of Harris County, Texas. He may be served with process at his place of business, City Hall Annex, 900 Bagby, First Floor, Houston, Texas 77002. Pursuant to a Rule 11 agreement, the City Attorney's office has agreed to answer for Robert Gallegos without the need for service of process.

16. Defendant Mike Laster is a City Council Member, Position District J, and a resident of Harris County, Texas. He may be served with process at his place of business, City Hall Annex, 900 Bagby, First Floor, Houston, Texas 77002. Pursuant to a Rule 11 agreement, the City Attorney's office has agreed to answer for Mike Laster without the need for service of process.

17. Defendant Larry Green is a City Council Member, Position District K, and a resident of Harris County, Texas. He may be served with process at his place of business, City Hall Annex, 900 Bagby, First Floor, Houston, Texas 77002. Pursuant to a Rule 11 agreement, the City Attorney's office has agreed to answer for Larry Green without the need for service of process.

18. Defendant Mike Knox is a City Council Member, Position at Large 1, and a resident of Harris County, Texas. He may be served with process at his place of business, City Hall Annex, 900 Bagby, First Floor, Houston, Texas 77002. Pursuant to a Rule 11 agreement, the City Attorney's office has agreed to answer for Mike Knox without the need for service of process.

19. Defendant David Robinson is a City Council Member, Position at Large 2, and a resident of Harris County, Texas. He may be served with process at his place of business, City Hall Annex, 900 Bagby, First Floor, Houston, Texas 77002. Pursuant to a Rule 11 agreement, the City Attorney's office has agreed to answer for David Robinson without the need for service of process.

20. Defendant Michael Kubosh is a City Council Member, Position at Large 3, and a resident of Harris County, Texas. He may be served with process at his place of business, City Hall Annex, 900 Bagby, First Floor, Houston, Texas 77002. Pursuant to a Rule 11 agreement, the City Attorney's office has agreed to answer for Michael Kubosh without the need for service of process.

21. Defendant Amanda Edwards is a City Council Member, Position at Large 4, and a resident of Harris County, Texas. She may be served with process at her place of business, City Hall Annex, 900 Bagby, First Floor, Houston, Texas 77002. Pursuant to a Rule 11 agreement, the City Attorney's office has agreed to answer for Amanda Edwards without the need for service of process.

22. Defendant Jack Christie is a City Council Member, Position at Large 5, and a resident of Harris County, Texas. He may be served with process at his place of business, City Hall Annex, 900 Bagby, First Floor, Houston, Texas 77002. Pursuant to a Rule 11 agreement, the

City Attorney's office has agreed to answer for Jack Christie without the need for service of process.

### III. JURISDICTION AND VENUE

23. This Court has subject matter jurisdiction over this lawsuit pursuant to Chapter 24 of Texas Government Code, as well as Chapters 37 and 65 of the Texas Civil Practice and Remedies Code.

24. This Court has personal jurisdiction over Defendants because the City is located in Harris County, Texas and the remaining Defendants are residents of Harris County, Texas.

25. Defendant City of Houston is not immune from the Fund's claims, because the Fund is bringing a Declaratory Judgment Act claim for which immunity from suit and liability are waived. On May 31, 2017, the Mayor and the City Council (collectively, the "City Council Defendants") enacted the 2018 Fiscal Year Budget for the City (hereinafter "the Budget") in apparent reliance upon an unconstitutional statute (SB 2190) but doing so constituted an *ultra vires*, unauthorized, illegal action, an abuse of discretion, and/or the failure to perform a ministerial act. Similarly, the individual Defendants are responsible for implementing the Budget and their joinder is necessary in order to secure the injunctive relief sought herein. Accordingly, Plaintiff is entitled to injunctive relief, a writ of mandamus, and declaratory relief. The individuals who are defendants in this suit are sued in their official capacity for carrying out *ultra vires*, unauthorized, illegal actions, actions which constituted the failure to perform a ministerial act, and/or for abusing the discretion granted them by law. The requested relief is also proper because governmental immunity does not preclude official-capacity suits against government officials and employees, who are violating the Constitution, including the award of prospective remedies for such violations. *See City of El Paso v. Heinrich*, 284 S.W.3d 366 (Tex. 2009).

26. Venue is proper in Harris County, Texas because all or a substantial part of the events or omissions giving rise to the Fund's claims occurred and are occurring in Harris County. Additionally, venue is proper in Harris County, Texas because one or more of City Council Defendants resided in Harris County, Texas when the cause of action accrued.

#### IV. STATEMENT OF FACTS

**A. The Fund is a statutorily created pension plan that provides benefits to the City's Firefighters.**

27. The Fund exists to provide retirement, disability, and survivor benefits to "[e]ach person who becomes a firefighter" for the City. Art. 6243e.2(1), § 13(a). Currently, the Fund's membership consists of approximately 3,700 active Firefighters and 2,900 retirees and survivors. Firefighters generally do not participate in Social Security and, thus, for many of the Fund's members and their families, the Fund's payment of retirement, disability, and survivor benefits are the only retirement or disability benefits they will receive. The City pays its Firefighters substantially less than comparable cities. The City is not in the top 100 cities in the country in terms of pay for firefighters according to 2017 data from the U.S. Bureau of Labor Statistics. So why do skilled Firefighters remain with the City? The answer is, in part, the Fund.

28. Pension benefits, including disability and related benefits, are critical to Firefighters because of the incidents of work related deaths, disabilities, and illness. According to the National Fire Protection Association ("NFPA"), there were more than 68,000 firefighter injuries in the United States in 2015. Of these, 29,130 were injuries at the scene of a fire. There were 8,350 documented cases of exposures to infectious diseases (e.g., hepatitis, meningitis, HIV, and others) and an estimated 27,250 documented exposures to hazardous conditions (e.g., asbestos, chemicals, fumes, radioactive materials) in 2015. At the same time, according to a multi-year study by the National Institute for Occupational Safety and Health ("NIOSH"), working as a firefighter

substantially increases the risk of having cancer and cancer-related deaths. As a result of the inherent risk of working as a firefighter, including on-job-injuries and work related illnesses, firefighters' productive work years and life expectancy are substantially lower than the general population. Consequently, it is critical to the Fund's members and their families that the City meets its financial obligations to the Fund, as established by law, in order for the Fund to provide benefits to its members and their families.

29. Article 6243e.2(1) and Chapter 802 of the Texas Government Code govern the Fund's and the City's rights, duties, and obligations to and for the Fund. The Board of Trustees (the "Board") manages and administers the Fund. *See id.* § 2(p).

30. Article 6243e.2(1) requires each member of the Fund to contribute a set percent of the member's salary. *Id.* § 13(c). The statute likewise requires the City to make contributions based on a "contribution rate certified by the board," which must be at least twice the amount contributed by Fund members and sufficient to ensure the long-term financial well-being of the Fund:

The municipality shall make contributions to the fund once every two weeks in an amount equal to the product of the contribution rate certified by the board and the aggregate salaries paid to members of the fund during the period for which the contribution is made. The board shall certify the municipality's contribution rate for each year or portion of a year based on the results of actuarial valuations made at least every three years. The municipality's contribution rate shall be composed of the normal cost plus the level percentage of salary payment required to amortize the unfunded actuarial liability over a constant period of 30 years computed on the basis of an acceptable actuarial reserve funding method approved by the board. Notwithstanding any other provision of this article, the contributions by the municipality, when added to any contributions with respect to a qualified governmental excess benefit arrangement maintained in accordance with Section 14(c) of this article, may not be less than twice the amount paid into the fund by contributions of the members.

*Id.* § 13(d).

31. While the Fund has been in existence since 1937, in 1975 by state-wide vote, Texans amended the Texas Constitution by adding Article XVI, Section 67—which, among other things, expressly authorizes the Texas Legislature to enact general laws establishing non-statewide pension systems for public employees and officers, such as Article 6243e.2(1). TEX. CONST. art. XVI, § 67(a)(1). Significantly, Texas Constitution Article XVI, Section 67(f) vests the Board with exclusive authority to “administer the system or program of benefits,” “hold the assets of the system or program for the exclusive purposes of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the system or program,” and “select legal counsel and an actuary and adopt sound actuarial assumptions to be used by the system or program.”<sup>1</sup> This latter portion—vesting in the Board the authority to “select . . . an actuary and adopt sound actuarial assumptions to be used by the system or program”—is at issue here. The current version of Article 6243e.2(1) complies with the constitutional mandate because it leaves to the Board the exclusive authority to appoint an actuary and determine the actuarial assumptions to be used by the Fund. Art. 6243e.2(1), § 13(d).

**B. The Texas Legislature passes Senate Bill 2190, which is unconstitutional.**

32. In 2017, the Texas Legislature passed, and Governor Abbott signed, SB 2190 which, among other things, substantively changes Article 6243e.2(1). A copy of SB 2190 is attached as Exhibit 1. SB 2190 seeks to alter the Board’s exclusive authority to appoint an actuary and determine actuarial assumptions in several impermissible ways.

---

<sup>1</sup> See, e.g., *West Orange-Cove Consol. ISD v. Alanis*, 107 S.W.3d 558, 563 (Tex. 2003) (“By assigning to the Legislature a duty, this section both empowers and obligates. It gives to the Legislature the sole authority to set the policies and fashion the means for providing a public school system.”) (emphasis added).

33. First, SB 2190 fixes an initial assumed rate of return at 7%, which could vary thereafter in accordance with actuarially assessed conditions. (Ex. 1, SB 2190 §§ 1.01(1-e), 1.14(13E), 1.17.) By statutorily fixing this rate, SB 2190 violates the Board's exclusive authority to adopt actuarial assumptions under Section 67(f) of the Texas Constitution.

34. Second, as set forth below, SB 2190 imposes a new procedure that requires the Board to compromise with the City in setting actuarial assumptions for the Fund, assumptions which help determine the City's contribution rate and contribution. SB 2190 requires both the Fund's and the City's actuaries to conduct a "Risk Sharing Valuation Study" ("RSVS") which is used to set the City's contribution rate to the Fund. (Ex. 1, SB 2190 § 1.14(13B, 13C).) SB 2190 sets forth certain actuarial assumptions that must be applied by the Fund's and City's actuaries. With regard to any assumptions not specifically enumerated, the City's actuary can adopt its own actuarial assumptions for its initial RSVS. (*Id.* § 1.14(13C) (identifying no limitation on the City's actuarial assumptions). For the City's subsequent RSVS's it may adopt actuarial assumptions recommended by an 'independent actuary' which differ from the Fund's actuary's recommendations. (*Id.* § 1.14(13D). The Fund's and the City's actuaries exchange their respective RSVSes and, if the difference between the estimated City contribution rate is less than or equal to two percentage points, the Fund's RSVS will be considered the final study for that fiscal year setting forth the City's contribution rate. (*Id.* § 1.14(13B, 13C).) But, if the estimated City's contribution rate in the Fund and the City's RSVSs differ by more than two percentage points, the Fund's and the City's actuaries must then work together to "reconcile the difference[s]." (*Id.*) Reconciliation efforts cannot result in a further increase in the variance of the different calculations unless agreed to by both actuaries, thus further limiting the power of the Board to determine actuarial assumptions. (*Id.*) Finally, if reconciliation cannot be achieved, the City contribution

rate will be established by averaging the Fund's and City's calculations resulting from the varying assumptions. (*Id.*)

35. SB 2190 unconstitutionally infringes on the Board's exclusive authority to "select . . . an actuary" and "adopt sound actuarial assumptions" under Article XVI, Section 67(f) of the Texas Constitution. As reflected by the above, the City's contribution rate will ultimately be determined by actuarial assumptions set by both the Board and the City and their actuaries—not the Board's own determinations based on consultations with and recommendations by its own actuary. SB 2190 provides the City equal and offsetting power to the Board in setting the actuarial assumptions because the City's independent determination of assumptions (as calculated by the RSVS prepared by the City's actuaries) can account for 50% of the equation under which the City's contribution rate is calculated.

36. The City acknowledged SB 2190's constitutional problems before the bill was filed. Upon information and belief, the City's representatives were actively involved in drafting portions of SB 2190, including the unconstitutional provisions at issue in this litigation. With full knowledge that SB 2190 violated the Texas Constitution, the City lobbied and actively pushed for the passage of SB 2190 as a necessary "fix" for the financial problems caused by the City underfunding three employee pensions. However, the problems with the City's pensions were not caused by the Fund. Indeed, the Texas Pension Review Board's ("PRB") Actuarial Valuation report from January of this year reported that the Fund had the best coverage ratio, meaning the percentage of known and actuarially anticipated future liabilities that can be paid from the value of a pension's assets, for all Texas public pensions holding more than \$1 billion dollars in management. The Fund's 89.7% coverage ratio is better than all other comparably sized government pensions. In addition, for the fourth year in a row, the Fund was recognized by the

American Investment Council (“AIC”), which ranked the Fund’s private equity portfolio in fifth place nationally.

37. SB 2190’s unconstitutional interference with the Board’s authority to adopt actuarial assumptions, including the setting of a rate of return, was addressed in hearing testimony before both the House and the Senate—yet the Texas Senate and the House of Representatives voted to pass SB 2190, which has now also been signed into law by Governor Abbott and will take effect on July 1, 2017.

38. The effective date of the bill, July 1, 2017, coincides with the City’s FY 2018. However, by its very terms, SB 2190 purports to require the Fund and the City to take various actions even prior to its effective date.

39. On May 30, 2017, the Board adopted an actuarial valuation report prepared by the Fund’s appointed actuaries. Under this report, the City’s actuarial contribution rate is 48.5% which equals approximately \$148,255,000 and anticipates a return on investment on the Fund’s assets of 7.25%. On May 30 and 31, the Fund gave notice of its adoption of actuarial assumptions and the City’s resulting contribution obligations under the existing version of Art. 6243e.2(1). (See Exhibit 2 and attachments.)

40. The City Council Defendants passed the Budget on May 31, 2017. The Budget employs SB 2190’s assumed 7% rate of return. However, because SB 2190 is unconstitutional, the Budget is statutorily required to employ the 7.25% rate of return certified by the Board under the existing Article 6243e.2(1), and a City contribution rate of 48.5% of covered payroll. However, in clear violation of law as well as an abuse of discretion, the City Council Defendants passed the Budget allocating less than half of the amount that should be contributed under the current statute. Thus, the Fund was forced to file this suit.

41. The City Council Defendants' *ultra vires* and illegal act and/or abuse of discretion in passing the Budget that fails to allocate the funds necessary to fund the City's lawful pension obligations will irreparably injure the Fund. The act of passing and implementation of the Budget is causing and will cause irreparable injury to the Fund and the Firefighters and their surviving children and spouses. While Plaintiff is not bringing suit for damages to its members and beneficiaries, the injuries to these persons as a result of Defendants' *ultra vires* and illegal acts are undeniable.

## V. CAUSES OF ACTION

### A. Declaratory judgment.

42. The Fund incorporates by reference each of the foregoing paragraphs as if fully set forth herein.

43. An actual controversy has arisen and now exists between the Parties concerning their respective rights and obligations under Texas law. Pursuant to Texas Civil Practice and Remedies Code Sections 37.001 *et seq.*, the Fund seeks the following declarations:

- a. that SB 2190 is unconstitutional because it impermissibly infringes on the Board's exclusive authority to "select . . . an actuary" and determine "sound actuarial assumptions" under Section 67(f) of the Texas Constitution;
- b. that the City must allocate funding in its budgets in accordance with the current, rather than the amended, Article 6243e.2(1) which will include, among other things, the Board's adopted assumed rate of return, unless and until the Legislature modifies or supersedes the statute in compliance with the Texas Constitution.

44. These declarations are necessary to afford relief from uncertainty and insecurity with respect to the Parties' respective rights and obligations under Texas law.

**B. Petition for writ of mandamus compelling Defendants to allocate funding in the current and all future proposed City budgets in accordance with existing Article 6243e.2(1) and not SB 2190.**

45. The Fund incorporates by reference each of the foregoing paragraphs as if fully set forth herein.

46. The Budget acts on and applies SB 2190, including its assumed rate of return at 7%. However, SB 2190 is unconstitutional because it impermissibly infringes on the Board's exclusive authority to "select. . . an actuary" and determine "sound actuarial assumptions" under Section 67(f) of the Texas Constitution. Defendants have no discretion to ignore, or abused their discretion by ignoring, the Texas Constitution and applying SB 2190 to the Budget, rather than the Board-certified rate in accordance with an actuarial valuation as currently provided by law.

47. Consequently, the Fund seeks a writ of mandamus compelling Defendants to allocate funding in the current and all future City budgets in accordance with the existing Article 6243e.2(1). The enactment and implementation of the Budget on July 1, 2017, means the Individual Defendants are causing the Fund irreparable injury as a result their *ultra vires* and illegal acts, abusing the discretion granted them by law, and/or their failing to carry out their ministerial duty regarding the City's contribution to the Fund. The irreparable injury to the Fund is imminent and immediate.

**C. Application for Temporary and Permanent Injunction.**

48. The Fund incorporates by reference each of the foregoing paragraphs as if fully set forth herein. The City Council Defendants adopted a Budget, and all of the Individual Defendants are proceeding to implement the Budget in accordance with SB 2190, an unconstitutional statute.

These actions constitute *ultra vires* and illegal acts, as well as an abuse of discretion and the failure to fulfill a ministerial duty.

49. The Individual Defendants' *ultra vires* and illegal impending implementation of the Budget irreparably injures the Fund, and these injuries are immediate.

50. The Fund seeks a temporary injunction prohibiting Defendants from acting in reliance on SB 2190, an unconstitutional statute, and requiring Defendants to allocate funding in the City Budget in accordance with the existing Article 6243e.2(1), which will, among other things, employ the Board's 7.25% rate of return.

51. The Fund is likely to succeed on the merits of this lawsuit against Defendants. SB 2190 is facially unconstitutional because it impermissibly infringes on the Board's exclusive authority to "select . . . an actuary" and determine "sound actuarial assumptions" under Section 67(f) of the Texas Constitution. Defendants have no discretion to ignore the Texas Constitution by applying SB 2190 in the Budget. Instead, Defendants must allocate funding in the current and all future proposed City budgets in accordance with the existing Article 6243e.2(1), which complies with the Texas Constitution. The implementation of the Budget and new fiscal year will begin July 1, 2017, so time is of the essence. The failure by Defendants to allocate funds in the Budget in accordance with existing Article 6243e.2(1) causes irreparable financial loss to the Fund, threatens the Fund's future well-being, and causes the City to prepare and approve improper budgets. Consequently, Defendant's *ultra vires* and illegal actions, which also constitute an abuse of their discretion and/or are a violation of their ministerial obligations, are causing and will cause the Fund and its beneficiaries immediate irreparable harm for which there is no adequate remedy at law. The Court's immediate intervention is necessary to preserve the status quo and protect against these irreparable and catastrophic occurrences. Accordingly, with notice to Defendants,

the Fund requests that the Court set a temporary injunction hearing and, at the conclusion of that hearing, enter a temporary injunction prohibiting Defendants from acting in reliance on SB 2190, an unconstitutional statute, and requiring Defendants to allocate funding in the Budget in accordance with existing Article 6243e.2(1).

52. Upon final trial, the Fund respectfully requests that the Court enter a permanent injunction enjoining Defendants from taking action pursuant to, or in reliance on, SB 2190, an unconstitutional statute, and compelling Defendants to allocate funding in the Budget in accordance with the existing Article 6243e.2(1).

**D. Attorneys' fees and costs.**

53. The Fund incorporates by reference each of the foregoing paragraphs as if fully set forth herein.

54. Pursuant to Texas Civil Practice and Remedies Code Section 37.009, the Fund seeks recovery of its costs of litigation and reasonable attorneys' fees. Texas courts have recognized that "by authorizing declaratory judgment actions to construe the legislative enactments of governmental entities and authorizing awards of attorney fees, the DJA necessarily waives governmental immunity for such awards." *Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994); *see also City of Arlington v. Randall*, 301 S.W.3d 896, 908 n.7 (Tex. App.—Fort Worth 2009, pet. denied) (request for attorney's fees from city "under the Declaratory Judgment Act is not barred by governmental immunity").

**VI. NOTICE**

55. Pursuant to Texas Government Code Section 402.010, the Fund is providing notice of this First Amended Petition for Declaratory Judgment to the Attorney General of Texas, Ken Paxton, by sending a copy of these papers to the Office of the Attorney General, 300 West 15th

Street, Austin, Texas 78701. The Fund further requests that the Court serve any requisite notice on the Attorney General as needed under Section 402.010.

## VII. CONCLUSION AND PRAYER

The Fund asks that Defendants be cited to appear and answer and that, upon final trial, the Court enter a Judgment in favor of the Fund by awarding the following relief:

- a. A Temporary Injunction as provided above, preserving the status quo, prohibiting Defendants from taking action in reliance on SB 2190, an unconstitutional statute, and compelling Defendants to allocate funding in the City Budget in accordance with existing Article 6243e.2(1) and Texas Constitution article XVI, section 67;
- b. A Writ of Mandamus and Declaratory Judgment as provided above;
- c. A permanent injunction prohibiting Defendants from taking action in reliance on SB 210, an unconstitutional statute, and compelling Defendants to allocate funding in the City Budget in accordance with Article 6243e.2(1) and Texas Constitution article XVI, section 67;
- d. Retrospective relief in the form of a money judgment for any underpayment of monies owed by the City to the Fund for failing to act in accordance with Article 6243e.2(1) and Texas Constitution article XVI, section 67, from July 1, 2017 to the date of the Final Judgment;
- e. Expedited consideration of this matter;
- f. Attorneys' fees;
- g. Court costs; and
- h. Any such other and further relief, at law or in equity, to which the Fund may be justly entitled.

Respectfully submitted,

**SHIPLEY SNELL MONTGOMERY LLP**

By:  /s/ George T. Shipley

George T. Shipley  
State Bar No. 18267100  
Amy L. Snell  
State Bar No. 24002968  
712 Main Street, Suite 1400  
Houston, Texas 77002  
Telephone: (713) 652-5920  
Facsimile: (713) 652-3057  
gshipley@shipleysnell.com  
asnell@shipleysnell.com

**McGINNIS LOCHRIDGE & KILGORE, L.L.P.**

Michael A. Shaunessy  
State Bar No. 18134550  
600 Congress Ave., Suite 2100  
Austin, Texas 78701  
Telephone: (512) 495-6061  
Facsimile: (512) 505-6361  
MShaunessy@mcginnislaw.com

COUNSEL FOR PLAINTIFF HOUSTON FIREFIGHTERS'  
RELIEF AND RETIREMENT FUND

**CERTIFICATE OF SERVICE**

I hereby certify that on June 6, 2017, a copy of the foregoing was sent to all defendants except Greg Travis via e-mail to Ms. Judith Ramsey at the address below, in accordance with Texas Rules of Civil Procedure 21 and 21a and a Rule 11 agreement. Service of process will be issued for Greg Travis.

Ms. Judith Ramsey  
Chief, General Litigation Section  
CITY OF HOUSTON LEGAL DEPARTMENT  
900 Bagby, 4th Floor  
Houston, Texas 77002  
**BY E-MAIL**

/s/ George T. Shipley  
George T. Shipley