6/16/2017 6:47:37 PM
Chris Daniel - District Clerk Harris County
Envelope No. 17682477
By: Tammy Tolman
Filed: 6/16/2017 6:47 PM

NO. 2017-36216

HOUSTON FIREFIGHTERS' RELIEF AND RETIREMENT FUND **Plaintiffs,** **v.** 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 BRIEF IN SUPPORT OF ITS APPLICATION FOR TEMPORARY INJUNCTION

Plaintiff Houston Firefighters' Relief and Retirement Fund (the "Fund") files this Brief in Support of Its Application for Temporary Injunction against Defendants.

I. INTRODUCTION

The Fund sued 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. The Fund seeks:

a. a Temporary Injunction preserving the status quo, prohibiting Defendants from taking action in reliance on Senate Bill 2190 ("SB 2190"), an unconstitutional

statute, and compelling Defendants to allocate funding in the 2018 Fiscal Year Budget for the City (the "Budget") in accordance with existing Texas Revised Civil Statutes Article 6243e.2(1) ("Article 6243e.2(1)") and Texas Constitution article XVI, section 67;

b. a writ of mandamus compelling Defendants to allocate funding in the current and all future proposed City budgets in accordance with the existing version of Article 6243e.2(1);

c. declaratory relief stating that SB 2190 is unconstitutional and that the City must allocate funding in accordance with the existing version of Article 6243e.2(1), including among other things, the Board's adopted rate of return; and

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. attorney's fees;

g. court costs; and

h. any such other further relief, at law or in equity, to which the Fund may be justly entitled.

This brief addresses the Fund's request for a temporary injunction preventing Defendants from proceeding to implement the Budget in accordance with SB 2190, a facially unconstitutional statute. The imminent implementation of the Budget will irreparably injure the Fund because

Defendants will allocate an insufficient amount of money to the Fund, thereby threatening the Fund's well-being and causing irreparable financial losses. A temporary injunction is necessary to prevent this harm because these damages are incapable of calculation or measurement and cannot be compensated with an adequate remedy at law.

II. BACKGROUND

The Fund is a public pension system whose membership consists of more than 6,600 active and retired firefighters, as well as their surviving spouses and children. The Fund is authorized and governed by Article 6243e.2(1). The Fund provides retirement, disability, and survivor benefits to eligible city 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.

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." Specifically, Article XVI, section 67 reads in relevant part:

> (f) Retirement Systems Not Belonging to a Statewide System. The board of trustees of a system or program that provides retirement and related disability and death benefits for public officers and employees and that does not participate in a statewide public retirement system shall:
>
> (1) administer the system or program of benefits;
>
> (2) 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
>
> (3) select legal counsel and an actuary and adopt sound actuarial assumptions to be used by the program.

TEX. CONST. art. XVI, § 67. This section specifically provides that the Board must select an actuary and adopt sound actuarial assumptions for the program. *Id.* § 67(f)(3). The "shall" language in Article XVI, section 67 establishes that the Board has a mandatory duty and exclusive authority to select an actuary and adopt actuarial assumptions.

Despite this clear constitutional directive, the Texas Legislature passed, and Governor Abbott has signed, SB 2190.[1] SB 2190 fixes an initial assumed rate of return at 7% and purports to grant authority, in part, to the City and to the City's actuary to determine other actuarial assumptions, including future assumed rates of return. By setting the assumed rate of return and giving the City the ability to control the setting of "actuarial assumptions", SB 2190 directly violates the Texas Constitution's mandate that the adoption of actuarial assumptions is within the exclusive purview of the Fund.[2] The City's actuary has taken the position that SB 2190 requires the Fund to take actions in accordance with its unconstitutional scheme even before it becomes effective on July 1, 2017.[3]

Furthermore, SB 2190 imposes a new procedure that divests the Board of the exclusive control over the setting of actuarial assumptions for the Fund, giving the City power to control part of the equation which determines the City's contribution rate and contribution to the Fund. SB

---

[1] Because of the margin by which SB 2190 passed the Texas House and Senate, SB 2190 becomes effective on July 1, 2017.

[2] The constitutional infirmity of SB 2190 goes beyond its effect on the adoption of actuarial assumptions for the Fund. It also interferes with the Fund's constitutional authority to "administer the system or program of benefits." TEX. CONST. art. XVI, § 67(f)(1). For example, SB 2190 requires the Fund and City to enter into a "cash balance plan" in certain situations that provide for "administration of the plan."

[3] On June 13, 2017, Retirement Horizons, Inc. ("RHI") sent a letter as the purported "municipal actuary within the meaning of [Article 6243e.2(1)]" demanding that the Fund provide Actuarial Data to RHI.

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. 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. For the City's subsequent RSVSs, it may adopt actuarial assumptions recommended by an "independent actuary" that differ from the Fund's actuary's recommendations.

The Fund's and the City's actuaries exchange their respective RSVSs 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. If, however, the estimated City's contribution rate in the Fund's 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]." 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. 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. The interference in the Board's assumption-setting authority can therefore directly lead to an artificially low contribution rate from the City.

City agents apparently acknowledged SB 2190's constitutional infirmities by entertaining in meetings the notion that a "savings" clause should be included to preserve the other portions of the bill if the unconstitutional portion was struck down. However, no such savings or severability

clause was included in SB 2190 as passed.SB 2190's effect on the Fund's control of its actuarial assumptions is not trivial—it leads to major changes in the way the City contributes to the Fund, and in the discretion the Fund possesses to manage its finances. The ongoing problems that these changes will pose for the Fund are evidenced in part by the City's Budget for 2018.

SB 2190 takes effect on July 1, 2017, which coincides with the start of the City's Fiscal Year 2018. The City Council passed its 2018 Budget on May 31, 2017. The Budget appears to allocate funding based upon the provisions of SB 2190. However, because SB 2190 is unconstitutional, the Defendants should be statutorily required to allocate funding in the Budget in accordance with a contribution rate of 48.5% of covered payroll as certified by the Board under existing Article 6243e.2(1). But in clear violation of the law, as well as in an abuse of discretion, the Defendants passed the Budget, appropriating less than half of the amount that should be contributed under the current statute.

Unlike past years, in determining the amount of money committed to the Fund for Fiscal Year 2018, the City failed to utilize the valuation and actuarial assumptions selected by the Fund. (Ex. A to the Fund's First Am. Pet.). For example, the City presumably utilized SB 2190's legislatively determined 7% rate of return. And, although the Fund is not privy to all of the actuarial assumptions used by the City to support its $70,330,310 budget line item for its contribution to the Fund (Ex. 1, attached, XV-25, Commit Item 501090), it is evident that the City's other actuarial assumptions differ significantly from the Fund's actuarial assumptions. If the City, in allocating funding under the terms of SB 2190, had used the Fund's actuarial assumptions, assumptions (but utilizing SB 2190's mandated 7% rate of return instead of the Fund's 7.25% rate of return), the City budget for 2018 would, under such an approach, have committed approximately $90 million,

not $70 million, to the Fund. This difference illustrates the importance of selecting the actuarial assumptions. And if, as the Fund maintains, SB 2190 is unconstitutional in its entirety, including SB 2190's significant reduction in benefits, the City Budget in that event allocates only $70 million of the $148 million that would be required for 2018 alone using the Fund's selected, sound actuarial assumptions and pre-SB 2190 benefit levels.

The amount of injury that the reduced allocation in the Budget will cause is not easily quantified, because the reduced contribution from the City under SB 2190 will force the Fund to change its investment objectives and strategies, which will have a lasting impact on the Fund's financial status. Furthermore, the City will likely argue that it is immune from liability for any retroactive relief for the Fund's losses. Accordingly, the Fund was forced to file suit and request this temporary injunction.

III. ARGUMENT AND AUTHORITIES

A temporary injunction serves to "preserve the status quo of the litigation's subject matter pending a trial on the merits." *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002); *see also Walling v. Metcalfe*, 863 S.W.2d 56, 57 (Tex. 1993). The status quo is the "last, actual, peaceable, noncontested status which preceded the pending controversy." *State v. Sw. Bell Tel. Co.*, 526 S.W.2d 526, 528 (Tex. 1975). In this case, a temporary injunction maintaining the status quo would set the City's contribution rate and implement a City Budget consistent with the existing version of Article 6243e.2(1), prior to the amendments in SB 2190.

To obtain a temporary injunction, an applicant must plead and prove three elements: "(1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim." *Butnaru*, 84 S.W.3d at 204; *see also Walling*, 863

S.W.2d at 57. The applicant need not show that it will prevail on the merits, just that it is entitled to preservation of the status quo pending trial. *Walling*, 863 S.W.3d at 58; *see also Sun Oil Co. v. Whitaker*, 424 S.W.2d 216, 218 (Tex. 1968). The Fund can satisfy all three required elements necessary to obtain a temporary injunction, and the balance of equities favors the injunction.

A. <u>The Fund has stated a valid cause of action against Defendants</u>

Article XVI, section 67 of the Constitution vests the Board with the exclusive authority to select an actuary and adopt sound actuarial assumptions. The use of the word "shall" in statutory interpretation "is generally construed as creating a nondiscretionary duty." *In re Robinson*, 175 S.W.3d 824, 830 (Tex. App.—Houston [1st. Dist.] 2005, no pet.); *Albertson's Inc. v. Sinclair*, 984 S.W.2d 958, 961 (Tex. 1999). Therefore, the "shall" language in Article XVI, § 67 establishes that the Board has a mandatory duty to select an actuary and adopt actuarial assumptions. When the Constitution directs an entity to a mandatory duty, and imposes that duty solely upon that entity, the entity has exclusive authority to carry out that duty. *West Orange-Cove Consol. I.S.D. 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). Per Article XVI section 67(f)(3) of the Texas Constitution, the power to set actuarial assumptions is conferred directly and exclusively upon the Board.

SB 2190 unconstitutionally interferes with these mandatory and exclusive duties by, among other items, setting an assumed rate of return and forcing the Fund to compromise with the City on its actuarial assumptions through the RSVS process. The Fund has requested injunctive and

declaratory relief that both SB 2190 and any actions taken in reliance upon SB 2190 are unconstitutional.

The Fund's request for equitable and declaratory relief regarding the constitutionality of SB 2190 waives Defendants' sovereign immunity from suit. "[Immunity from suit] is inapplicable in a suit against a governmental entity that challenges the constitutionality of a statute and seeks only equitable relief." *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 76–77 (Tex. 2015).

Additionally, the Fund has asserted that the Defendants are acting ultra vires. The ultra vires exception to sovereign immunity from suit applies when a suit alleges and proves "that [an] officer acted without legal authority or failed to perform a purely ministerial act." *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009). Purely ministerial acts are those which leave no room for discretion or judgment by a governmental officer. *Sw. Bell Tel. v. Emmett*, 459 S.W.3d 578, 587 (Tex. 2015).

The ultra vires exception encompasses the acts of a state agent "acting pursuant to an unconstitutional law." *Rylander v. Caldwell*, 23 S.W.3d 132, 135 (Tex. App.—Austin 2000, no pet.); *see also Ackers v. City of Lubbock*, 253 S.W.3d 770, 774 (Tex. App.—Amarillo 2007, pet. denied); *Nueces Cnty. v. Ferguson*, 97 S.W.3d 205, 219 (Tex. App.—Corpus Christi 2002, no pet.). The proper party for an ultra vires claim is the state actor in his official capacity. *Heinrich*, 284 S.W.3d at 372. If the suit challenges the validity of the statute as well as the agent's actions, neither the State nor the agent in his official capacity are immune. *Cf. Patel*, 469 S.W.3d at 76–77 (Tex. 2015) (state was not immune from constitutional challenge to statute, but plaintiffs did not challenge actions of officials, so there was no ultra vires claim).

The City Council's adoption of the Budget and the impending implementation of the Budget are taken in reliance on an unconstitutional statute, and the challenge to the validity of this statute is properly brought as a claim for declaratory and injunctive relief. *See Patel*, 469 S.W.3d at 76–77; *Heinrich*, 284 S.W.3d at 372. The Fund has therefore alleged valid causes of action in this case. *Butnaru*, 84 S.W.3d at 204.

B. <u>The Fund has a probable right to the injunctive relief sought</u>

When examining probable right to relief, courts look at the defendants' alleged wrongful conduct. *Law v. William Marsh Rice Univ.*, 123 S.W.3d 786, 792 (Tex. App.—Houston [14th Dist.] 2003, pet. denied); *Surko Enters., Inc. v. Borg–Warner Acceptance Corp.,* 782 S.W.2d 223, 225 (Tex. App.—Houston [1st Dist.] 1989, no writ). Here, the Fund has alleged that Defendants wrongfully failed to allocate necessary funds in the 2018 Budget.

Governmental entities have a ministerial duty to allocate money when such an allocation is required by statute, even if there is discretion to form the budget as a whole. *See Ector Cnty. v. Stringer*, 843 S.W.2d 477, 479 (Tex. 1992) (holding that commissioners court had discretion to set a reasonable salary, but there is a ministerial duty to make that salary "reasonable"); *Vondy v. Comm'rs Court of Uvalde County*, 620 S.W.2d 104, 108 (Tex. 1981) (finding that commissioners court had ministerial duty to allocate money for salary). Essentially, when there is a mandatory requirement that a governmental entity pay an amount, that duty is ministerial and failure to pay is an ultra vires act. *See also Smith v. Flack*, 728 S.W.2d 784, 789 (Tex. Crim. App. 1987) (holding that county auditor and commissioners court had ministerial duty to pay attorney fees awarded by trial court).

The 14th Court of Appeals has previously found that the duty to set aside an appropriate amount of funds for a pension contribution is mandatory, non-discretionary, and therefore ministerial. In *City of Houston v. Houston Mun. Emp. Pension Sys.*, 513 S.W.3d 114, 130 (Tex. App.—Houston [14th Dist.] 2016), *reh'g denied* (Feb. 14, 2017) (hereafter "*HMEPS*"), the court found that the relevant statute "mandates the City perform certain contribution actions and does not provide any discretion to avoid such duties." *Id.* The court concluded that because HMEPS challenged "the City's particular failures to properly allocate funding in the budget for contributions set and required by statute," it was alleging ultra vires claims for failure to perform a ministerial duty, and sovereign immunity on that count was waived. *Id.*

A claimant who successfully proves an ultra vires claim "is entitled to prospective injunctive relief." *Heinrich*, 284 S.W.3d at 376. A request for an injunction compelling allocation of funding in current and future budgets is not prohibited retrospective monetary relief, but rather prospective injunctive relief. *HMEPS*, 513 S.W.3d at 129; *see Heinrich*, 284 S.W.3d at 376.

Defendants are wrongfully failing to allocate sufficient funds in the Budget to provide necessary contributions to the Fund. Defendants are relying upon an unconstitutional statute to limit their contributions, and should instead be adhering to the requirements in the original version of Article 6243e.2(1). Accordingly, Defendants are acting ultra vires because they are both acting without legal authority pursuant to an unconstitutional statute and failing to perform a ministerial act. *See Heinrich*, 284 S.W.3d at 372; *Vondy*, 620 S.W.2d at 108l; *HMEPS*, 513 S.W.3d at 130. Because of Defendants' wrongful, ultra vires conduct, the Fund is entitled to the prospective injunctive and declaratory relief it seeks, and has established a probable right of recovery accordingly. *See Law*, 123 S.W.3d at 792.

C. Defendants' ultra vires conduct threatens imminent and irreparable harm

The applicant for a temporary injunction must show that the injury that would result from the lack of an injunction is probable, imminent, and irreparable. *Butnaru*, 84 S.W.3d at 204; *Walling*, 863 S.W.2d at 57. An imminent and probable injury is one that is actually threatened, as opposed to speculative or purely conjectural. *Tex. Dep't of Pub. Safety v. Salazar*, 304 S.W.3d 896, 908 (Tex. App.—Austin 2009, no pet.); *see also Frey v. DeCordova Bend Estates Owners Ass'n*, 647 S.W.2d 246, 248 (Tex. 1983). Imminent injury can be established by evidence that a governmental entity defendant intends to continue with ongoing wrongful conduct. *See City of San Antonio v. Vakey*, 123 S.W.3d 497, 501 (Tex. App.—San Antonio 2003, no pet.).

An injury is irreparable if it cannot be adequately compensated in damages or the damages cannot be measured by any certain pecuniary standard; essentially, there must be no adequate remedy at law. *Butnaru*, 84 S.W.3d at 204; *Intercontinental Terminals Co., LLC v. Vopak N. Am., Inc.*, 354 S.W.3d 887, 895 (Tex. App.—Houston [1st Dist.] 2011, no pet.); *Ahmed v. Shimi Ventures, L.P.*, 99 S.W.3d 682, 692 (Tex. App.—Houston [1st Dist.] 2003, no pet); *Vakey*, 123 S.W.3d at 501. A remedy at law is only adequate if it is "as complete, practical, and efficient to the prompt administration as is equitable relief." *Cardinal Health Staffing Network Inc. v. Bowen*, 106 S.W.3d 230, 235 (Tex.App.—Houston [1st Dist.] 2003, no pet.). A legal remedy is also inadequate if the award of damages may come too late. *T–N–T Motorsports, Inc. v. Hennessey Motorsports, Inc.*, 965 S.W.2d 18, 24 (Tex.App.—Houston [1st Dist.] 1998, no pet.).

Financial harm that is difficult to quantify and that will affect an entity going forward constitutes an irreparable injury. *See, e.g.*, *Pub. Utils. Comm'n of Tex. v. Gen. Tel. Co. of the Sw.*, 777 S.W.2d 827, 830 (Tex. App.—Austin 1989, writ dism'd) (concluding that evidence that

telephone company would "suffer an impaired ability to borrow funds, an increased cost of capital, a diminished cash flow, a substantial risk of a downrating of its bonds, reductions in its workforce and its capital budget, and a decreased ability to maintain its level and quality of service and competitive position" was sufficient to support temporary injunction). Similarly, an injury that would change the quality of an entity's services to its members or customers is irreparable. *See, e.g.*, *Univ. Health Servs., Inc. v. Thompson*, 24 S.W.3d 570, 578 (Tex. App.—Austin 2000, no pet.) (holding that temporary injunction preventing closure or change in admission practices for hospital was appropriate where doctors would be unable to provide same standard of care to patients).

Even if there was a remedy at law, governmental entities such as the City frequently assert that they are immune from liability for money damages. If the statute is unconstitutional, then the Fund can only be made whole through a final money judgment and equitable relief, not a judgment limited to declaratory relief. However, governmental entities such as the City frequently assert the defense of immunity from liability. If successful, this defense will mean that the Fund receives no compensation for the damages it incurs during the pendency of this lawsuit even though it acted expeditiously to challenge the constitutionality of SB 2190.[4] *See, e.g.*, *Harris Cnty. Hosp. Dist. v. Tomball Reg'l Hosp.*, 283 S.W.3d 838, 843–45, 849 (Tex. 2009) (despite constitutional and statutory provisions requiring hospital district's "full responsibility" for medical care, hospital could not sue for hospital district's failure to pay); *Nueces Cnty. v. San Patricio Cnty.*, 246 S.W.3d

[4] The Fund has not slept on its rights during the process of the statute's formation. Even prior to the passage of SB 2190, the Fund informed two legislative committees through briefing and testimony about its concerns with the constitutionality of SB 2190.

651, 653 (Tex. 2008) (finding that county was immune from liability for money damages despite illegally collecting property taxes on property located in another county). A temporary injunction is the only means by which the Fund is made whole.

The City Council has passed a Budget that is set to take effect July 1, 2017. Implementation of the Budget will cause the City's contributions to the Fund to be over $75 million lower than they should be under the status quo over the first year alone. As this litigation proceeds, that number could exceed hundreds of millions of dollars. The decrease in contributions will cause an immediate and irreparable injury to the Fund. *See Vakey*, 123 S.W.3d at 501. Unless immediately enjoined, Defendants will not allocate a sufficient amount of money to the Fund, and the Fund will be forced to disrupt its established investment plans. To make up for the drastically decreased City contribution, the Fund would have to take on increased investment risks in order to attempt to cover the shortfall, and even that course of action is likely to fail, which would in turn further reduce the total assets under the Fund's management. The likely shortfall in investment returns from taking greater risks would only exacerbate the underfunding issue. The financial problems that would result will cause irreparable harm to the Fund, and therefore affect its members and their survivors. *See Pub. Utils. Comm'n*, 777 S.W.2d at 830; *Univ. Health Servs.*, 24 S.W.3d at 578.

Thus, the consequences of the Defendants' wrongful and ultra vires actions in reliance upon SB 2190 will only exacerbate the ills it was meant to cure. SB 2190 was intended in part to help the City's pensions. But as set forth above, Defendants' underfunding will only damage the financial health of one of the best run and most financially stable pensions in the State of Texas, considering its ratio of assets to actual and known liabilities.

The catastrophic and irreparable injuries directly resulting from the reduction in the City's contribution will produce an injury that is impossible to measure. *See Butnaru*, 84 S.W.3d at 204; *Intercontinental Terminals Co.*, 354 S.W.3d at 895; *Ahmed*, 99 S.W.3d at 692. Calculating the damage to the Fund is impractical because it would require a counterfactual examination of what the Fund would have done (i.e., investments it would have made and fiscal decisions it would have undertaken) had it been able to operate on the proper budget. While the actual amount the City is legally obligated to pay to the Fund can be quantified, the harm to the Fund's investment strategies and resulting assets under management (with which to fund benefits) will be substantial and cannot be quantified with the legally required precision. *See Butnaru*, 84 S.W.3d at 204; *Univ. Health Servs.*, 24 S.W.3d at 578.

The difficulty of calculating this damage means that there is no adequate remedy at law that would be able to compensate the Fund for the loss of its contributions under the proposed Budget. *Cf. Bowen*, 106 S.W.3d at 235. Any remedy that was available would be too late and/or unavailable because of alleged immunity from liability to alleviate the harm, particularly in a case such as this one, where lengthy litigation over a novel legal issue is likely. *See T–N–T Motorsports,* 965 S.W.2d at 24. The adoption and imminent implementation of the Budget will cause immediate and irreparable harm to the Fund, and a temporary injunction is the only way to avoid this hardship. *See Butnaru*, 84 S.W.3d at 204; *Walling*, 863 S.W.2d at 57.

D. <u>Balancing the equities favors the Fund</u>

A court analyzing the need for a temporary injunction may balance the equities of the parties and the resulting conveniences and hardships that the parties will suffer if the injunction is granted. *See Univ. Health Servs.*, 24 S.W.3d at 578; *Vakey*, 123 S.W.3d at 501. The court may

consider whether significant or slight injury would result if the injunction were erroneously denied, and whether significant or slight injury would result if the injunction were erroneously granted. *T.F.W Mgmt., Inc. v. Westwood Shores Prop. Owners Ass'n*, 162 S.W.3d 564, 575 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

The reduction in the City's contribution undermines the Fund's financial security, which will change its entire outlook. To maintain its financial well-being, the Fund will need to increase the return realized from its investments, which necessarily requires increasing the risk profile of its investment portfolio. Long term, these increases in risk will likely reduce the total amount of assets under the Fund's management, as well as impact its ability to provide benefits for firefighters and their families in the years ahead. The harm to the Fund's investment strategies and resulting assets under management will be substantial and cannot be quantified with the legally required sufficiency, thus creating a significant injury that cannot be compensated by a remedy at law. *See id.*

In contrast, Defendants' possible injury if the injunction was erroneously granted is minor. Defendants have had to comply with the prior version of Article 6243e.2(1) up until the passage of SB 2190, but under the new Budget seek to shift the monies that should be allocable to the Fund to new projects and obligations. While Defendants may need to adjust their Budget to account for the difference in allocation, any injury caused by compelling defendants to act in the same lawful manner as they have been acting for years would be minimal. The comparison of the Defendants' possible injury to the disastrous effects the Fund would face from underpayment of hundreds of millions of dollars (that the City should rightfully contribute over the next few years) is striking.

Because the potential harm to the Fund is so much greater than the potential harm to Defendants, the balance of equities favors granting the temporary injunction. *See Thompson*, 24 S.W.3d at 578; *Vakey*, 123 S.W.3d at 501; *T.F.W Mgmt.*, 162 S.W.3d at 575.

IV. CONCLUSION

The Fund has established that it has asserted a valid cause of action to which it has a probable right of recovery, and it would imminently suffer irreparable harm if a temporary injunction is not granted. Accordingly, this Court should grant the application for temporary injunction and require Defendants to allocate the necessary funds to preserve the status quo.

V. PRAYER

The Fund asks the Court to grant its application for a temporary injunction and enter an order prohibiting Defendants from acting 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).

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 16, 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.

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