6/20/2017 5:39 PM
Chris Daniel - District Clerk Harris County
Envelope No. 17737823
By: Tammy Tolman
Filed: 6/20/2017 5:39 PM

NO. 2017-36216

HOUSTON FIREFIGHTERS' RELIEF AND RETIREMENT FUND,	§	IN THE DISTRICT COURT OF
Plaintiff,	§	
v.	§	HARRIS COUNTY, TEXAS
CITY OF HOUSTON, ET AL.,	§	
Defendants.	§	190TH JUDICIAL DISTRICT

CERTAIN DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S APPLICATION FOR TEMPORARY INJUNCTION, SUBJECT TO CERTAIN DEFENDANTS' PLEA TO THE JURISDICTION

Subject to the pleas to the jurisdiction asserted separately by Certain Defendants, and without waiving the same, Defendants City of Houston (the "City"), the Hon. Sylvester Turner (the "Mayor"), 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 (collectively, the "City Council"), file this Response in Opposition to the Application for Temporary Injunction filed by Plaintiff Houston Firefighters' Relief and Retirement Fund ("HFRRF"), and would show the following:

I. INTRODUCTION

On May 30, 2017, HFRRF filed an Original Petition for Declaratory Judgment seeking a declaration that the Pension Reform Legislation passed and approved by the Texas Legislature, Senate Bill 2190 ("SB 2190"), was unconstitutional. HFRRF claimed that SB 2190 violates Article XVI, Section 67(f) of the Texas Constitution because it purportedly deprives HFRRF's Board of its putative "authority" to engage legal counsel, select an actuary, adopt sound actuarial

assumptions. HFRRF made these claims despite the fact there is nothing in SB 2190 prohibiting HFRRF's Board from:

- Selecting legal counsel;
- Selecting an actuary; or
- Adopting sound actuarial assumptions.

HFRRF's Original Petition further alleged *ultra vires* claims by asserting the City and other Defendants will violate Section 67(f) by making contributions as determined by SB 2190, rather than the contributions determinable under the prior law, Article 6243e.2(1) of the Texas Revised Civil Statues.

Rather than naming as defendants the governmental entity that enacted SB 2190 or its legal representative – *i.e.*, the State of Texas and/or the Attorney General – HFRRF instead sued the City, the Mayor, the City Council, the City Controller and the City's Director of Finance. HFRRF neither pleaded nor sought a temporary restraining order or temporary injunction in connection with its original petition.

Belying its erroneous claim of "irreparable harm," HFRRF waited six days until after SB 2190 was enacted into law following the Governor's signature to file an amended petition asserting a claim for a temporary injunction. The amended petition again failed to name as defendants the State or the Attorney General. HFRRF then waited another seven days before filing a Notice of Hearing on its Application for a Temporary Injunction. By that time, the City already had taken certain actions required by SB 2190 to effectuate its provisions.

HFRRF now seeks a temporary injunction that would: (1) require the Court to declare unconstitutional a duly enacted, presumptively valid state statute even though the governmental entity that enacted the challenged statute has not been made a party to this lawsuit; and (2) compel Defendants to undertake official actions in violation of the duly enacted,

presumptively constitutional SB 2190. Subject to the Pleas to the Jurisdiction filed contemporaneously with this Response, the Application for Temporary Injunction should be denied for any one of the following reasons:

- HFRRF cannot demonstrate a likelihood of success on the merits of its claim that SB 2190 is unconstitutional;
- HFRRF has no probable right of relief on its *ultra vires* and mandamus claims;
- HFRRF's alleged harm is speculative and certainly not irreparable;
- HFRRF has an adequate remedy at law for its speculative, alleged harm; and
- The balance of equities does not support HFRRF's position.

HFRRF's Application for Temporary Injunction must be denied.

II. BACKGROUND

A. The Pension Fund Statutes at Issue

HFRRF's amended petition erroneously omits the important fact that its constitutional challenge to SB 2190 affects statutes other than Article 6243e.2(1), the statute which governs HFRRF. SB 2190 amends three separate statutes governing three different pension systems:

(1) Article 6243e.2(1), which governs HFRRF;

(2) Article 6243g-4, which governs the Houston Police Officers' Pension System ("HPOPS"); and

(3) Article 6243h, which governs the Houston Municipal Employees Pension System ("HMEPS").

HFRRF's amended petition also fails to acknowledge the undisputed fact that the Texas Legislature created HFRRF, HPOPS, HMEPS, and their predecessors. It is further undisputed that the Legislature created the predecessors to HFRRF, HPOPS, and HMEPS prior to 1975, when Article XVI of the Texas Constitution was amended to add Section 67(a)(1). That Section authorizes the Legislature to "enact general laws establishing systems and programs of

retirement and related disability and death benefits for public employees and officers." Tex. Const. art. XVI, § 67(a)(1).

Over 25,000 current and former City municipal employees and their dependents participate in HMEPS. Over 9,000 current and former Houston Police officers and their dependents participate in HPOPS. HMEPS has pension system assets in excess of $2 billion. HPOPS' pension assets exceed $4 billion. Even though HFRRF's constitutional challenge to SB 2190 concerns provisions that are mirror images of other provisions in SB 2190 affecting HMEPS and HPOPS, neither one of these pension systems has joined in HFRRF's lawsuit.

B. The Pension Crisis Faced by the City

For well over a decade, since changes to the pension system that were made in 2001, the City has faced an extraordinary financial crisis because of the spiraling, uncontrolled pension obligations owed to participants and beneficiaries under HFRRF, HMEPS and HPOPS. Similar pension-related financial issues have forced municipalities, large and small, into bankruptcy, and remain one of the biggest challenges to state and local governments. The City is facing an unfunded pension liability of over $8 billion. In 2015, Moody's Investors Service ("Moody's") placed the City on a "negative outlook," indicating that Moody's would downgrade the City's bond rating. One year later, both Moody's and Standard & Poor's Ratings Services elected to downgrade the City's general obligation bond rating, citing unfunded pension obligations as one of the principal reasons for the downgrades.

The City has undertaken various efforts to address these pension-related budgetary shortfalls. As the Court will recall, one of the steps the City undertook in the past involved litigation concerning the City's statutory obligations to make contributions to HFRRF and the constitutionality of the Legislature's amendments to the pension statutes under Article XVI, Section 16 of the Texas Constitution. *See, e.g.*, Cause No. 2014-02548, *City of Houston v.*

Houston Firefighters' Relief and Retirement Fund, in the 190th Judicial District Court of Harris County, Texas (the "2014 *City of Houston v. Houston Firefighters'* Lawsuit"). HFRRF represented to the Court in the 2014 *City of Houston v. Houston Firefighters'* Lawsuit that the City should seek relief from the Legislature – not the courts – stating:

> What the City really opposes are the Legislature's considered judgments and the 1975 Constitutional amendment that confirm the Legislature's broad and long-standing power to establish pension systems. In essence, the City has drafted a new pension fund statute more to its liking, and rather than propose it to the Legislature, the City has submitted it to this Court.

See Defendant Houston Firefighter' Relief and Retirement Fund's Response to Plaintiff's Motion for Summary Judgment at 35, Ex. 1.

The City has now done precisely what HFRRF told this Court the City should do in 2014 to address its pension-related shortfalls. It went to the Legislature. HFRRF strenuously opposed the City in efforts to reduce its pension-related shortfalls by, among other things, supporting a proposed amendment to then-pending Pension Reform Legislation which amendment "would add an estimated $400 million to the unfunded liability burden borne by Houston taxpayers." Editorial, *Repairing Pensions*, Hous. Chronicle, May 9, 2017, attached as Exhibit 2. Without this Pension Reform Legislation, HFRRF's members' pension benefits "will break the city's bank." *Id*. And even though the Pension Reform Legislation would make HFRRF's members' retirement benefits "more comparable to the salary percentages paid to (Houston's) police officers," HFRRF refused to compromise. *Id*.

The Legislature acted on the Pension Reform Legislation. Now that the shoe is on the other foot, HFRRF has disregarded the representations it made to this Court in the 2014 *City of Houston v. Houston Firefighters'* Lawsuit and instead wants the judicial system to resolve its complaints about a duly enacted pension statute, rather than the Legislature.

C. SB 2190

During the recently completed regular session of the Legislature, State Senator Joan Huffman of Houston introduced SB 2190. The bill analysis for SB 2190 explains the statement of intent behind the bill:

> The three Houston pension systems face serious funding shortfalls and rising costs that jeopardize their long-term sustainability. S.B. 2190 addresses these challenges by making significant changes to the Houston Firefighters' Relief and Retirement Fund, Houston Municipal Employees Pension System, and Houston Police Officers' Pension System. The bill reduces certain benefits to lower current liabilities, increases employee contributions and strengthens employer contributions to better fund the systems, codifies more conservative actuarial assumptions to improve the transparency of obligations owed, and establishes clear funding policies with a mechanism for sharing risk and controlling costs in the future. S.B. 2190 also provides for voter approval should pension obligation bonds be issued to fund any part of the systems' unfunded liabilities.

Bill Analysis, S.B. 2190, 85th Leg., R.S. (2017); Ex. 3.

The Texas Senate adopted SB 2190 by a vote of 25 Yeas, 5 Nays, 1 Present, not voting. The Texas House adopted SB 2190 by a vote of 103 Yeas, 43 Nays, 3 Present, not voting. The bill received extraordinary legislative support, notwithstanding HFRRF's vigorous lobbying efforts against passage. The Governor signed SB 2190 into law on May 31, 2017.

Because it received more than a 2/3rds majority vote in both houses, SB 2190 has an effective date of July 1, 2017. *See* Amended Petition at ¶ 38. Prior to that time, however, SB 2190 requires both HFRRF and the City to take certain actions to effectuate the statute's provisions. For example, SB 2190 requires the City and HFRRF to take steps to establish the amount of the City's contribution prior to the commencement of the fiscal year, which include performing risk sharing valuation studies ("RSVS"). Additionally, the City Council adopted a budget that includes an estimated amount of the City's contribution to HFRRF based on methods and assumptions required for an RSVS by Section 1.14 of SB 2190 (to be codified as Tex. Rev. Civ. Stat. art. 6243e.2(1), §13(C)). If the City's estimated contribution rate is not sufficient to

cover its statutorily-mandated contributions in any year, SB 2190 would follow standard actuarial practice to include the difference in the unfunded liability and mandates that the City make up the difference over a defined period of time. *Id*., at § 13B(a)(6)(E-F).

While the comprehensive pension reform adopted by the Legislature and signed into law by the Governor makes substantial changes to the pension statutes applicable to HFRRF, HMEPS and HPOPS, there is **nothing** in SB 2190 prohibiting HFRRF's Board from:

- Selecting legal counsel;
- Selecting an actuary; or
- Adopting sound actuarial assumptions.

And there is **nothing** in Section 67(f) of the Texas Constitution prohibiting the Legislature from amending Article 6243e.2(1), as it did with SB 2190. *Infra* at 17-20.

On the contrary, SB 2190 was enacted in part to fulfill the Legislature's constitutional obligation that the financing of benefits for pension systems the Legislature creates "must be based on sound actuarial principles." Tex. Const. art. XVI, § 67(a)(1). Tellingly, HFRRF fails to mention or balance the Legislature's own constitutional duty. HFRRF's constitutional challenge to SB 2190 is an unwarranted and meritless attempt to divest the Legislature of its powers to create and abolish pension systems and to enact and amend pension statutes to fulfill its constitutional mandate under Section 67(a)(1). *See infra* at 13-17.

III. REQUIREMENTS FOR ISSUING A TEMPORARY INJUNCTION

The Court is well familiar with the requirements a party in HFRRF's position must meet to be entitled to a temporary injunction. A temporary injunction is an extraordinary remedy that does not issue unless the party seeking relief pleads and proves the following elements: (1) a cause of action; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. *International Paper Co. v. Harris Cty., Tex.*, 445 S.W. 3d 379,

387 (Tex. App.—Houston [1st Dist.] 2013, no pet.). If the party moving or applying for a temporary injunction fails to discharge its burden as to any one of these elements, the party is not entitled to extraordinary relief. *Id*. at 397.

A "probable injury" for purposes of a temporary injunction includes the elements of imminent harm, irreparable injury, and no adequate remedy at law. *Shor v. Pelican Oil & Gas Mgt., LLC*, 405 S.W.3d 737, 750 (Tex. App.—Houston [1st Dist.] 2013, no pet.). A temporary injunction may not issue unless the party moving for that injunction shows a likelihood of success on the merits. *Kinney v. Barnes*, 443 S.W.3d 87, 94 n.9 (Tex. 2014). A temporary injunction cannot be granted solely upon the mere speculation of injury, fear, or apprehension. *Shor*, 405 S.W.3d at 750. If the party moving for a temporary injunction has other existing legal remedies, the party may not seek equitable relief through an injunction. *Barnstone v. Robinson*, 678 S.W.2d 562, 563 (Tex. App.—Houston [14th Dist.] 1984, writ dism'd). A party cannot show the lack of an adequate remedy by the mere fact the remedy provided would involve more expense or delay. *Tex. Dep't of Public Safety v. Salazar*, 304 S.W.3d 896, 909 n.11 (Tex. App.—Austin 2009, no pet.).

Although HFRRF claims that it seeks an injunction "prohibiting" Defendants from acting in reliance on SB 2190, the City already has acted in reliance upon the statute; it adopted a budget in accordance with SB 2190's assumed rate of return for the fiscal year ending June 30, 2018, as well as benefit, contribution, and other changes enacted by SB 2190. As a result, the true relief HFRRF seeks is a "mandatory" injunction to compel the Defendants to allocate funding in the budget with a rate of return and level of benefits and contributions HFRRF's board adopted are not in compliance with SB 2190. *See* Amended Petition at ¶ 50. A mandatory injunction is one that changes the status quo and should be granted only in a case of extreme

hardship. *See, e.g., RP&R, Inc. v. Territo*, 32 S.W.3d 396, 400 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (modifying the trial court's mandatory injunction by deleting the provisions requiring the defendant to tender weekly paychecks to the plaintiff). Courts "are reluctant to issue mandatory orders in ancillary proceedings and will do so only when the right thereto is clearly shown and when such an order is necessary to prevent a serious injury that is not compensable." *Lawyers Surety Corp. v. Rankin*, 500 S.W.2d 181, 182-83 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ ref'd n.r.e.) (affirming trial court's denial of a temporary injunction to require a constable to approve all proper bonds presented to him in the future). An application for a mandatory temporary injunction should be denied absent a clear and compelling presentation of extreme necessity or hardship. *Territo*, 32 S.W.3d at 400-401.

A trial court considering an application for a temporary injunction also must weigh the respective conveniences and hardships of the parties and balance the equities. *In re Gamble*, 71 S.W.3d 313, 317 (Tex. 2002). Consideration of the equities involves weighing the public interest against the injury to the parties from the grant or denial of the injunctive relief. *International Paper*, 445 S.W.3d at 395. Here, the consideration of the equities involves weighing (1) the public interest in upholding the presumptively constitutional enactment by the Legislature of a statute addressing the challenges faced by the three Houston pension systems of serious funding shortfalls and rising costs that jeopardize their long-term sustainability, against (2) the purported injury to HFRRF's Board – as opposed to HFRRF's participants, none of whom are litigants claiming a deprivation of their pension benefits – resulting from the enactment of a statute that does not prohibit the Board from selecting legal counsel, selecting an actuary, or adopting sound actuarial assumptions.

IV. HFRRF CANNOT MAKE THE REQUISITE SHOWING OF A LIKELIHOOD OF SUCCESS ON THE MERITS

HFRRF's Amended Petition asserts three basic claims: (1) SB 2190 is unconstitutional; (2) the Defendants are or will be acting *ultra vires* by complying with SB 2190; and (3) mandamus should be issued against the Defendants to compel them to act in violation of SB 2190. The common denominator for all these three claims is the constitutionality of SB 2190; *i.e.*, unless the Court were to declare SB 2190 unconstitutional, HFRRF has no claim for relief whatsoever. Moreover, HFRRF cannot establish a probable right of relief on its *ultra vires* and mandamus claims independent of the resolution of the constitutional issue.

A. HFRRF Has Failed to Establish that SB 2190 Is Unconstitutional

1. The Necessary Parties Are Not Presently Before the Court

HFRRF has failed to join the State of Texas or its legal representative, the Attorney General, as a party to its lawsuit challenging the constitutionality of SB 2190. Rule 39(a) of the Texas Rules of Civil Procedure provides that a person who is subject to service of process shall be joined as a party in the action if in his or her absence complete relief cannot be accorded among those already parties, or he or she claims an interest relating to the subject of the action and is so situated that the disposition of the action in his or her absence may as a practical matter impair or impede his or her ability to protect that interest. Rule 39(a) further provides that if this person has not been joined as a party, "the court **shall** order that he be made a party." (Emphasis added)

HFRRF has asserted its constitutional challenge to SB 2190 in connection with its declaratory judgment claim under the Uniform Declaratory Judgment Act ("UDJA"), Tex. Civ. Prac. & Rem. Code § 37.001, *et seq*. The UDJA does not, by itself, constitute a waiver of a governmental entity's immunity from suit. *See, e.g., City of El Paso v. Heinrich*, 284 S.W.3d

366, 370 (Tex. 2009). Although two intermediate appeals courts have held that a governmental entity is not immune from being made a party to a suit challenging the constitutionality of a statute the governmental entity did not enact, those cases did not address the basic issue of which governmental entities must be made parties to the suit.[1]

Section 37.006 of the UDJA does speak to the issue of persons or entities who must be made parties to a declaratory judgment action. Section 37.006(a) provides that when declaratory relief is sought, all persons who have or claim any interest that would be affected by the declaration must be made parties. Section 37.006(b) provides that in any proceeding involving the validity of a municipal ordinance or franchise, the municipality must be made a party and if the statute, ordinance, or franchise as alleged to be unconstitutional, the Attorney General of the state must be also be served with a copy of the proceeding and is entitled to be heard.

This case does not involve the validity of a municipal ordinance or franchise. It involves a constitutional challenge to a statute enacted by the Legislature. Although HFRRF apparently has provided a copy of its lawsuit to the Attorney General, that alone will not satisfy the necessary party requirements of Rule 39(a) and Section 37.006(a). The Texas Supreme Court has made clear that "[t]he (UDJA) thus contemplates that governmental entities may be – indeed *must be* joined in suits to construe their legislative pronouncements." *Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994) (emphasis added).

"Their legislative pronouncements" in this case involves the pronouncements of the Legislature in enacting SB 2190. HFRRF therefore must join the State of Texas, or its legal representative, the Attorney General, as a party to this lawsuit before the Court may consider HFRRF's constitutional challenge to the Legislature's "legislative pronouncement" of SB 2190.

[1] *See Lone Star College Sys. v. Immigration Reform Coalition of Tex. (IRCOT)*, 418 S.W.3d 263 (Tex. App.—Houston [14th Dist.] 2013, pet. denied); *Hamilton v. Washington*, No. 03-11-00594-CV, 2014 WL 7458988 (Tex. App.—Austin, Dec. 23, 2014, no pet.) (mem. op.).

2. This Court Must Presume SB 2190 Is Constitutional

Whenever a litigant challenges the constitutionality of a Texas statute, the court considering that challenge must begin its analysis by presuming the statute is constitutional. *Union Carbide Corp. v. Synatzske*, 438 S.W.3d 39, 55 (Tex. 2014) (reversing appeals court's determination that statute was unconstitutional as applied). A litigant who attacks a statute on constitutional grounds has the burden to prove it is unconstitutional, and "courts need not exert their ingenuity to find reasons for holding the law invalid." *Methodist Health Care System of San Antonio, Ltd., L.L.P. v. Rankin*, 307 S.W.3d 283, 285 (Tex. 2010), quoting *Tex. Nat'l Guard Armory Bd. v. McCraw*, 132 Tex. 613, 126 S.W.2d 627, 634 (1939).

The burden to show that a Texas statute is unconstitutional is a heavy one. A court must uphold the validity of a statute unless it is clearly unconstitutional. *Central Educ. Agency v. Ind. Sch. Dist. of City of El Paso*, 152 Tex. 56, 254 S.W.2d 357, 361 (1953). The constitutionality of a statute must be sustained by the courts unless its invalidity is apparent "beyond a reasonable doubt." *State v. City of Austin*, 160 Tex. 348, 331 S.W.2d 737, 747 (1960). Courts must presume that a statute was enacted based upon any possible factual basis that will sustain its constitutionality. *See Texas Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 520 (Tex. 1995). A litigant who attacks the constitutionality of a statute has the burden to negate every conceivable basis which might support the statute, whether or not the basis has a foundation in the record. *Mauldin v. Tex. State Bd. of Plumbing Examiners*, 94 S.W.3d 867, 873-74 (Tex. App.—Austin 2002, no pet.), quoting *Heller v. Doe*, 509 U.S. 312, 320-21 (1993).

When faced with multiple constructions of a statute, a court must interpret the statutory language in a manner that renders it constitutional if it possible to do so. *City of Pasadena v. Smith*, 292 S.W.3d 14, 19 (Tex. 2009), quoting *City of Houston v. Clark*, 197 S.W.3d 314, 320 (Tex. 2006). Any doubts as to the constitutionality of a statute "should always be resolved in

favor of constitutionality." *Smith v. Decker*, 158 Tex. 416, 312 S.W.2d 632, 635 (1958). And in resolving any such doubts, courts must presume that the Legislature did not intend to enact an unconstitutional law. *See Smith v. Davis*, 426 S.W.2d 827, 831 (Tex. 1968).

3. The Legislature Had the Constitutional Authority to Enact SB 2190

In 1975, the Texas Constitution was amended to add Section 67 to Article XVI. Section 67(a)(1) authorizes the Legislature to "enact general laws establishing systems and programs of retirement and related disability and death benefits for public employees and officers." When asked to interpret this section of the Texas Constitution, the Attorney General of Texas explained that Section 67(a) is "a **grant of authority**, conferring very flexible power on the legislature to establish retirement and disability systems." Tex. Atty Gen. Op. No. JM-1142 at 4 (1990) (emphasis added), attached as Exhibit 4. Under this constitutional grant of authority, the Legislature enacted Article 6243e.2, the predecessor to the version of the statute that was amended by SB 2190. *Id.* at 5. Like its predecessor, the version of the statute amended by SB 2190 – Article 6243e.2(1) – was promulgated pursuant to Section 67(a) of Article XVI of the Texas Constitution. *Williams v. Houston Firemen's Relief and Retirement Fund*, 121 S.W.3d 415, 438 (Tex. App.—Houston [14th Dist.] 2003, no pet).

The adoption of Section 67(a)(1) in 1975 "was the first time the Constitution expressly granted general authority (to the Texas Legislature) to enact pension law although the Legislature had previously exercised such authority . . ." *City of Houston v. Houston Firefighters' Relief and Retirement Fund*, 502 S.W.3d 469, 472 (Tex. App.—Houston [14th Dist.] 2016, no pet.) "For almost forty years before 1975, the City operated under Texas Revised Civil Statute Article 6243e, which established a pension fund in cities having an organized fire department with equipment valued at $1,000 or more." *Id.* Prior to the Legislature's enactment of Article 6243e in 1937, the Texas Commission of Appeals held that the Legislature had the

constitutional power to create pension funds for municipal employees. *Byrd v. City of Dallas*, 6 S.W.2d 738, 740 (Tex. Comm'n of App. 1928, op. adopted). The Texas Supreme Court elaborated on the Legislature's power over pension funds for municipal employees when it held that the Legislature has the power to amend, modify, or even abolish pension systems the Legislature has created for municipal employees. *See City of Dallas v. Trammell*, 129 Tex. 150, 101 S.W.2d 1009, 1012-14 (1937). The appeals court in *City of Houston* followed these principles in confirming that the statute governing HFRRF was promulgated by the Legislature pursuant to the authority granted under Section 67(a) of the Texas Constitution. 502 S.W.3d at 486.

None of the above principles describing the Legislature's power to enact statutes like SB 2190 and to amend statutes like Article 6243e.2(1) should come as a surprise to HFRRF. HFRRF embraced these principles when it made the following representations to this Court in the 2014 *City of Houston v. Houston Firefighters'* Lawsuit:

- "(HFRRF) is purely a creation of the Legislature." Ex. 1 at 17;
- "The Legislature retains almost complete authority over the amount of benefits paid and how the benefits are funded (under Article 6243e.2(1))." *Id.* at 19;
- "The regulated ability to raise benefit levels operates only at the margin, and even there it is strictly cabined by the Legislature." *Id.*;
- "Section 67(a)(1) (of Article XVI of the Texas Constitution) grants the Legislature the broad power to 'enact general laws establishing systems and programs of retirement and related disability and death benefits for public employees and officers.'" *Id.* at 28;
- "Section 67(a)(1)'s 'grant of power is more flexible than present provisions . . . and gives constitutional status to <u>whatever</u> systems or programs the Legislature may create.'" *Id.* at 29 (emphasis added);
- "The Legislature has express constitutional authority to determine how to compensate public employees, including how to set compensation levels and how to fund that compensation." *Id.* at 35.

During the appellate proceedings following this Court's summary judgment upholding the constitutionality of Article 6243e.2(1), HFRRF made further representations concerning the Legislature's power over HFRRF:

- "The statute, not the Board, governs the contributions required by the fund's members and the city;"
- "(HFRRF) has been subject to close review by the Legislature;"
- "The actual statute, the Texas Government Code, and the Texas Constitution impose numerous restrictions, requirements, and guidelines on the Board's authority and discretion."

See Br. of HFRRF in No. 14-14-00437-cv, *City of Houston v. Houston Firefighters' Relief and Retirement Fund*, at 6, 9, and 12.

What is even more remarkable about HFRRF's constitutional challenge to SB 2190 is that HFRRF has never before raised a complaint about the Legislature's power to amend Article 6243e.2(1) in ways that directly affect the actuary selected by the Board and the Board's actuarial assumptions. For example, the 1999 Legislature amended Section 10 of Article 6243e.2(1) to state that the benefits provided by the statute only may be increased if the Board-selected actuary determined that the increase cannot reasonably be viewed as posing a material risk of jeopardizing the fund's ability to pay any existing benefit, and further required the State Pension Board to approve the Board-selected actuary's determination. *See* Act of October 1, 1999, 76th Leg., R.S., ch. 211, § 8. Prior to this statutory amendment, the actuary's power was broader, as the State Board of Pensions was required to not unreasonably withhold its approval of the actuary's determinations. *Id*.

In 2001, the Legislature again amended Article 6243e.2(1) by adding several sub-sections to Section 10 which removed the actuary's authority to make determinations concerning the Board's payment of supplemental benefits to retired members, and instead required those

payments to be made in accordance with the amended statute. *See* Act of September 1, 2001, 77th Leg., R.S., ch. 7, § 3. Instead of complaining about the Legislature's alleged "interference" with HFRRF's Board-selected actuary, HFRRF represented to the Court in 2014 that HFRRF "is purely a creation of the Legislature." Ex. 1 at 17.

HFRRF also cannot be heard to complain about the Legislature's power to amend the statute to ensure that the funding of benefits is based on sound actuarial principles. Section 67(a)(1) expressly grants power to the Legislature, in establishing pension systems for public employees, to ensure that the "[f]inancing of benefits must be based on sound actuarial principles." Tex. Const. art. XVI, § 67(a)(1). The Bill Analysis of Senate Joint Resolution 3 – the resolution authorizing the proposed amendment to Article XVI of the Texas Constitution adding Section 67 – explained that Section 67(a)(1) would require that "benefits must be based on sound actuarial principles – a new requirement which places a new level of fiscal and fiduciary responsibility on the Legislature and the administrative bodies which manage the systems." Tex. Att'y Gen. Op. No. JM-1142 at 4-5 (1990), *quoting* Bill Analysis, S.J.R.3, 64th Leg. (1975) (emphasis added). For HFRRF to now claim – as it does in paragraph 51 of its Amended Petition and its brief – that HFRRF's Board has the "sole" and "exclusive" authority to determine sound actuarial assumptions is preposterous.

In 2003, the Legislature acted in accordance with the Constitutional requirement in Section 67(a)(1) that the Legislature exercise fiduciary responsibility to ensure that benefits must be based on sound actuarial principles when it amended Section 13(d) of Article 6243e.2(1). Prior to the 2003 amendment, the statute provided that the municipality's contribution rate was to be composed of several factors required to amortize the unfunded actuarial liability over a period of 40 years beginning on January 1, 1983. The 2003 amendment changed that provision

to require amortization of the unfunded actuarial liability to be over a "constant period of 30 years." *See* Act of September 1, 2003, 78th Leg., R.S. ch. 333, § 9(d). Once again, this amendment demonstrates the Legislature has the power to amend the statute governing HFRRF on provisions of the statute concerning sound actuarial principles, which necessarily includes actuarial assumptions. It is no wonder that HFRRF had to acknowledge in its 2014 litigation with the City that HFRRF "has been subject to close review by the Legislature."

4. SB 2190 Is Not "Facially" Unconstitutional

HFRRF erroneously alleges in its amended petition that SB 2190 is "facially" unconstitutional because it allegedly infringes impermissibly on HFRRF's Board's "exclusive" authority to select an actuary and "determine" sound actuarial assumptions. The constitutional provision HFRRF cites is Section 67(f) of Article XVI of the Texas Constitution. Contrary to HFRRF's erroneous argument, Section 67(f) is neither a grant of authority to HFRRF's Board nor a limitation on the Legislature's power over the pension systems it creates.

A statute is not facially invalid unless it could not be constitutional under any circumstances. *Appraisal Review Bd. of Galveston Cty., Tex. v. Tex-Air Helicopters, Inc.*, 970 S.W.2d 530, 534 (Tex. 1998). In a facial challenge to the constitutionality of a statute, courts are to consider the statute as written, rather than as it operates in practice. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 873 (Tex. 2000).[2] Courts may, however, consider the statute's legislative history and reasonable constructions of the statute by the agency charged with implementing it. *Id.*

[2] HFRRF presumably characterizes its constitutional challenge to SB 2190 as a "facial" challenge because HFRRF would have to admit that SB 2190 is generally constitutional, and HFRRF could not seek pre-trial relief were it to have made an "as applied" challenge. An "as applied" constitutional challenge concedes the general constitutionality of the statute but asserts the statue is unconstitutional as applied to the complaining litigant's particular facts and circumstances. *State ex. rel. Lykos v. Fine*, 330 S.W.3d 904, 910 (Tex. Crim. App. 2011). An "as applied" challenge only can be brought during or after a trial on the merits. *Id.*

Section 67 of Article XVI of the Texas Constitution was amended in 1993 to add Section 67(f). This amendment originated from Senate Joint Resolution 31. The Bill Analysis of SJR 31 makes clear that Section 67(f) was nothing more than a "belt-and-suspenders" provision:

> Although the responsibilities of trustees should be obvious, it is still important to set them out in the Texas Constitution so there is no question . . . This constitutional amendment would not require the trustees to do anything they are not already doing, if they are behaving as they should be . . . The purpose of SJR 31 would be to set out the fiduciary responsibilities and duties of the trustees, not the members.

House Research Organization Bill Analysis SJR 31 (May 20, 1993); Ex. 5.

Indeed, Section 67(f) did not impose on HFRRF's Board any requirements it did not already have concerning the selection of an actuary or adopting sound actuarial assumptions. Sixteen years before Section 67 of the Texas Constitution was amended to add Section 67(f), the Legislature enacted Article 6228(l) of the Texas Revised Civil Statutes. *See* Act of June 15, 1977, 65th Leg., R.S., ch. 594. This statute required public retirement systems like the predecessor to HFRRF to employ an actuary who was to make recommendations to the governing body of the public retirement system to ensure the actuarial soundness of the system. *Id*. at § 2. This statute has now been codified as Section 802.102 in the Texas Government Code.

Nothing in SB 2190 alters those requirements. The Legislature – not the Texas Constitution – empowered HFRRF's Board to employ an actuary to make recommendations to the Board to ensure the actuarial soundness of HFRRF. *See* Tex. Rev. Stat. Ann. art. 6243e.2(1) § 3(b)(3); Tex. Gov't Code § 802.102. SB 2190 does not prohibit HFRRF's Board from employing an actuary. SB 2190 also does not prohibit HFRRF's Board from adopting sound actuarial assumptions.

Furthermore, the requirements of Section 67(f) cannot be interpreted as some kind of "grant of sole and exclusive authority" to HFRRF's Board. The Texas Supreme Court has recognized that the Texas Constitution "is in no sense a grant of power but operates solely as a limitation of power." *Shepherd v. San Jacinto Junior College Dist.*, 363 S.W.2d 742, 743 (Tex. 1962) (emphasis added). As the appeals court in *City of Houston* recognized, the fact that HFRRF's Board chooses the actuary "does not translate to the Board having control over the actuary's performance of its duties and thus the contribution rate." 502 S.W.3d at 478. To the extent Section 67(f) can be viewed as anything other than a confirmation of the requirements already imposed on HFRRF's Board by Section 802.102 of the Government Code, it is a limitation on the powers the Legislature granted the Board in Article 6243e.2(1) to confirm the Board cannot do whatever it wants with the pension funds of a public retirement system. It requires that in its management of the pension funds, actuarial assumptions adopted by the Board must be sound, which is not a change from its prior fiduciary duty.[3]

Section 67(f) of the Texas Constitution also cannot be interpreted as a limitation on the Legislature's authority to amend statutes governing public retirement systems that the

[3] HFRRF improperly attempts to conflate the term "shall" in Section 67(f) into a "grant of sole or exclusive authority." The cases HFRRF cites concerned the manner in which the Government Code explains how statutes are to be construed unless the context in which the word or phrase appears necessarily requires a different construction. *See, e.g., In re Robinson*, 175 S.W.3d 824, 830 (Tex. App.—Houston [1st Dist.] 2005, orig. proceeding), citing Tex. Gov't Code Ann § 311.016. Chapter 311 of the Government Code applies to terms in a statute or code provision, not the Texas Constitution. *See id.*, § 311.002. But even if Section 311.016 were applicable to Section 67(f) of the Texas Constitution, that would not support HFRRF's erroneous argument. "Shall" imposes a duty. Tex. Gov't Code Ann. § 311.016(2). "Is entitled to" – which does not appear in Section 67(f) – creates or recognizes a right. *Id.* at (3). In contrast, Section 67(a) provides that the Legislature "may" enact general laws like SB 2190. Consistent with the legislative history of Section 67(a), "may" creates discretionary authority or grants permission or a power. Tex. Gov't Code Ann. § 311.016(1). Similarly, the term "must" in Section 67(a) – providing that the Legislature's financing of benefits of the public retirement systems it creates "must" be based on sound actuarial principles" – is construed in the Government Code to mean "creates or recognizes a condition precedent." *Id.* at (3). Thus, if Section 311.016 of the Government Code were to apply to interpret the terms in Section 67 of the Texas Constitution, the following interpretations would result: (1) the Legislature is granted the power and discretionary authority to create public retirement systems like HFRRF; (2) a condition precedent to the Legislature's exercise of that power is to base the financing of benefits on sound actuarial principles; and (3) HFRRF's Board has a duty – not a right or power – to select an actuary and adopt sound actuarial assumptions.

Legislature created, such as Article 6243e.2(1). Initially, the plain language of Section 67(f) only relates to 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." Tex. Const. Act. XVI, § 67(f). The Legislature is not mentioned or referenced in Section 67(f). There also is nothing in Section 67(f) or any other provision of the Texas Constitution that prohibits the Legislature from:

- Authorizing the City to employ its own actuary;
- Requiring the City and HFRRF to prepare initial risk sharing valuation studies;
- Establishing a corridor midpoint between the risk sharing valuation studies;
- Amending the contribution rates for the members and the City;
- Providing for an assumed rate of return for the fiscal year ending June 30, 2018; or
- Enacting or amending a statute to ensure sound actual principles have been adopted – as discussed *supra*, Section 67(a)(1) expressly requires the Legislature to ensure the funding of benefits of a public retirement system like HFRRF is based on sound actuarial principles.

It defies all credulity for HFRRF to argue, as it does, that there are no circumstances under which SB 2190 could be constitutional. *See Appraisal Rev. Bd.*, 970 S.W.2d at 534 (holding that a statute is not facially invalid unless it could not be constitutional "under any circumstances"). The requirements of Section 67(f) apply equally to the boards of HPOPS and HMEPS. The provisions in SB 2190 about which HFRRF complains are virtually identical to other provisions in SB 2190 concerning HPOPS and HMEPS. Neither HPOPS nor HMEPS, however, has intervened in this case or filed separate litigation to challenge the constitutionality of SB 2190. When a statute is constitutional under any possible set of facts, the Court must "presume that such facts exist without making a separate investigation of the facts or attempt to decide whether the Legislature has reached a correct conclusion with respect to the facts."

Barshop v. Medina Cty. Underground Water Conservation Dist., 925 S.W.2d 618, 625 (Tex. 1996) (reversing trial court's order enjoining implementation of the Legislature's Edwards Aquifer Act and holding the statute was constitutional on its face).

The Court is required to construe statutes like SB 2190 in a manner that renders them constitutional and gives effect to the Legislature's intent. *See Quick v. City of Austin*, 7 S.W. 3d 109, 115 (Tex. 1998). "When faced with multiple constructions of a statute, (courts) must interpret the statutory language in a manner that renders it constitutional if it is possible to do so." *Clark*, 197 S.W.3d at 320 (emphasis added). The Court also is required to rely heavily on the literal text of a constitutional provision to give effect to its plain language. *See Harris Cty. Hosp. Dist. v. Tomball Reg'l Hosp.*, 283 S.W.3d 838, 842 (Tex. 2009). Because there is no provision in SB 2190 prohibiting HFRRF's Board from selecting an actuary or adopting sound actuarial assumptions, and because nothing in the plain language of Section 67(f) of the Texas Constitution either grants authority to HFRRF's Board to do anything or limits the Legislature's power to amend and modify statutes governing public retirement systems, SB 2190 cannot be "facially" unconstitutional.

5. SB 2190 Does Not Unconstitutionally Infringe on HFRRF's Board's "Authority"

Stripped to its essence, HFRRF's real complaint in this lawsuit is that SB 2190 changes the manner as to how the City's contribution rate for funding HFRRF will be determined. There is, of course, nothing in Section 67 of the Texas Constitution empowering HFRRF's Board to do anything. For example, there is no language in Section 67(f) empowering HFRRF's Board to establish an assumed rate of return or set a contribution level for the City "that cannot be changed by the Legislature." Those words simply do not appear in the Texas Constitution.

Having failed to establish that SB 2190 is "facially" unconstitutional, HFRRF argues that SB 2190 somehow "impermissibly infringes" on its Board's purported "authority" to select an actuary and adopt sound actuarial assumptions. That is not a constitutional challenge HFRRF can make.

In a different context, Texas courts have recognized that one branch of government cannot exercise a power inherently belonging to another branch. *See, e.g., General Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 600 (Tex. 2001). This prohibition derives from Section 1 of Article II of the Texas Constitution, which governs separation of powers. But that doctrine cannot apply here because HFRRF is not part of the executive branch or the judicial branch of the state; it is a public retirement system created by the Legislature. And the Legislature created HFRRF pursuant to the Legislature's constitutional grant of power under Section 67(a) of the Texas Constitution. *See Williams*, 121 S.W.3d at 438. Even if HFRRF somehow could be equated to an administrative agency under a different branch of the Legislature, there cannot be a separation of powers violation when the entity derives its powers from a delegation of authority from the Legislature. *See Tex. Comm'n on Environmental Quality v. Abbott*, 311 S.W.3d 663, 673-74 (Tex. App.—Austin 2010, pet. denied).

As the Court will recall, one of the key issues in the 2014 *City of Houston v. Houston Firefighters'* Lawsuit was whether Article 6243.e2(1) was an unconstitutional delegation of power from the Legislature to HFRRF. In supporting its argument that Article 6243e.2(1) was constitutional, HFRRF argued that the extensive restrictions the Legislature had imposed on the authority of HFRRF's Board made constitutional the Legislature's delegation of powers under the statute. *See* Ex. 1 at 18-21. In other words, the greater the restrictions, the more likely the statute is constitutional; the fewer restrictions, the more likely the statute is unconstitutional.

HFRRF now inconsistently argues that because the Legislature allegedly has restricted HFRRF's Board's "authority," that somehow makes SB 2190 unconstitutional. HFRRF has it backwards. By exercising the constitutional grant of power authorized in Section 67(a) to ensure the financing of benefits of a public retirement system the Legislature creates is based on sound actuarial principles, the Legislature has strengthened the constitutionality of the statute governing HFRRF.

In summary, SB 2190 does not violate the Texas Constitution, facially or otherwise. The fact that HFRRF does not like SB 2190 does not make the statute unconstitutional. HFRRF is a creature of the Legislature, not the Texas Constitution. HFRRF's Board's powers are derived from the Legislature, not the Constitution. HFRRF therefore cannot show a likelihood of success on the merits as to its constitutional challenge of SB 2190. On this basis alone, HFRRF's application for a temporary injunction must be denied.

B. HFRRF Cannot Show a Likelihood of Success on the Merits on Its *Ultra Vires* Claim

HFRRF alleges that all of the Defendants acted *ultra vires* because they allegedly are complying or will comply with the provisions of SB 2190. Because SB 2190 is constitutional, Defendants cannot possibly be acting without legal authority in complying with SB 2190. But the Court does not have to decide the constitutional issue here in order to find that HFRRF has no probable right of relief on its *ultra vires* claim. That is because the Defendants are immune from that claim.

1. The City Is Immune From HFRRF's *Ultra Vires* Claim

An *ultra vires* claim requires the litigant to prove that a governmental official acted without legal authority or failed to perform a purely ministerial act. *Heinrich*, 284 S.W.3d at 372. Such claims have been recognized as an exception to the sovereign immunity of the

governmental official. *Id*. But an *ultra vires* claim cannot be asserted against the governmental entity itself. *Id*. at 373. The governmental entity instead retains its immunity from an *ultra vires* lawsuit. *Id*. Therefore, the Court must grant the City's plea to the jurisdiction because the City is immune from HFRRF's *ultra vires* claim.

2. HFRRF Cannot Show a Likelihood of Success on the Merits on Its *Ultra Vires* Claim Against the Mayor and City Council

The Mayor and City Council are immune from HFRRF's claims in this lawsuit. HFRRF's *ultra vires* claims are nothing more than an attempt to recast HFRRF's constitutional challenge to SB 2190 into an *ultra vires* claim. That cannot be done. *See, e.g., Patel v. Tex. Dept. of Licensing and Regulation*, 469 S.W.3d 69, 76-77 (Tex. 2015) (the *ultra vires* exception to sovereign immunity does not apply when a litigant challenges the validity of a statute with which the governmental official complied). To hold otherwise would place a governmental official in a Hobson's choice: If the governmental official complies with a statute that a litigant claims is unconstitutional, the governmental official would be acting *ultra vires*; but if the governmental official refuses to comply with the statute, the official still is acting *ultra vires*. That makes no sense.

Because HFRRF alleges SB 2190 is unconstitutional, it cannot further claim that a governmental official acting in reliance upon that statute was acting *ultra vires*. Instead, HFRRF must confine its claim to its meritless constitutional challenge of SB 2190. Under Section 37.006 of the UDJA, individual governmental officials are not proper parties to a constitutional challenge. The UDJA does not waive their immunity to such a challenge. Instead, the proper party is the governmental entity that enacted the statute being challenged. *Leeper*, 893 S.W.2d at 446. The plea to the jurisdiction filed by the Mayor and City Council therefore must be granted because they are immune from HFRRF's suit.

C. HFRRF Cannot Show a Likelihood of Success of the Merits of Its Mandamus Claim

HFRRF further alleges a claim for mandamus against all of the Defendants. A claim for mandamus seeks to compel a governmental body or official to act consistent with governing law or to compel a ministerial act. *Womack v. Berry*, 156 Tex. 44, 291 S.W.2d 677, 682 (1956). In effect, it is a mirror image of an *ultra vires* claim.

Like its *ultra vires* claim, HFRRF cannot pursue a mandamus claim to compel Defendants to comply in the future with a statute that is no longer governing law. Here, HFRRF seeks to compel Defendants to adopt a new budget for fiscal year 2018 based on the provisions of Article 6243e2(1) that do not apply to fiscal year 2018. That certainly cannot be a "ministerial act," as it would require the governmental official to disobey the requirements of SB 2190, which govern fiscal year 2018 for the City. *Cf., First Federal Sav. & Loan Ass'n v. Vandygriff*, 639 S.W.2d 492, 499 (Tex. App.—Austin 1982, writ dism'd) (holding that a statute is binding upon all within its jurisdictional limits and within its terms until repealed or declared invalid).[4]

Once again, HFRRF seeks to morph its constitutional challenge to SB 2190 into a cause of action for which the Defendants enjoy immunity. Defendants cannot be forced to comply with a statute that will not govern their actions for fiscal year 2018 merely because a litigant claims that statute is unconstitutional. And because HFRRF has not shown and can never show that SB 2190 is unconstitutional, it cannot complain about a governmental body and its officials who comply with that statute. *Cf., Chenault v. Phillips*, 914 S.W.2d 140, 141 (Tex. 1996 (orig. proceeding) (per curiam) (holding that litigant who challenged the constitutionality of a statute

[4] HFRRF's citation to *City of Houston v. Houston Mun. Emp. Pen. Sys.*, 513 S.W.3d 114, 130 (Tex. App.—Houston [14th Dist.] 2016, pet. filed) is inapposite. The alleged non-discretionary duty of the City to allocate funding in the budget for statutorily-mandated contributions in that case concerned the City's compliance with an existing statute whose constitutionality was not at issue. Here, HFRRF claims the Defendants must refuse to comply in the future with a statute that has been amended, even though the amended statute is presumptively constitutional. The Court is required to construe an amended statute as if it had been originally enacted in its amended form. *Ramos v. State*, 303 S.W.3d 302, 306 (Tex. Crim. App. 2009).

was not entitled to a writ of mandamus but instead was required to make its constitutional challenge in district court and appeal any adverse ruling through the ordinary appellate process).

V. HFRRF HAS NO IRREPARABLE INJURY

HFRRF acknowledges, as it must, that it is not bringing suit for damages to its members. *See* Amended Petition at ¶ 41. HFRRF cannot bring a suit for damages to its members because it has no standing to assert such a lawsuit against Defendants, and Defendants would be immune from any such suit. *Reata Const. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006) (political subdivisions of the state, including cities, are entitled to governmental immunity from lawsuits for money damages unless immunity has been waived).[5]

HFRRF also has not claimed in this lawsuit that the provisions of SB 2190 which set a contribution level for HFRRF's members or reduce their benefits are unconstitutional. Nor could they assert such a claim. Nothing in the Texas Constitution prohibits the Legislature from amending a pension statute to change the members' contribution rates or their benefits. *Cf., Klumb v. Houston Mun. Emp. Pension Sys.*, 458 S.W.3d 1, 16 (Tex. 2015) (holding there is no vested right to future pension benefits that would preclude the legislature from repealing or modifying a law upon which the pension system is founded). As HFRRF previously represented to this Court, "[t]he Legislature retains almost complete authority over the amount of benefits paid and how the benefits are funded (under Article 6243e.2(1)." Ex. 1 at 19.

[5] HFRRF's brief cites two Texas Supreme Court cases for the proposition that a governmental entity's immunity from liability for damages results in "irreparable harm" when a litigant seeks damages relating to the governmental entity's reliance upon an allegedly unconstitutional statute. *See* HFRRF's Brief at 13-14. Neither one of those cases involved a claim for injunctive relief or any discussion of irreparable harm. *See Harris Cty. Hosp. Dist. v. Tomball Reg'l Hosp.*, 283 S.W.3d 838 (Tex. 2009); *Nueces Cty. v. San Patricio Cty.*, 246 S.W.3d 651 (Tex. 2008). Indeed, no reported Texas cases have held that irreparable harm can be shown merely by alleging the existence of a damages claim against a governmental entity that is immune from liability for damages. To hold otherwise would eviscerate the irreparable harm requirement in injunctive suits against a governmental entity that is immune from liability for damages.

HFRRF instead claims it supposedly will be "irreparably" injured if SB 2190's assumed rate of return of seven percent for the fiscal year ending June 30, 2018, is used, instead of HFRRF's anticipated return of 7.25 percent. According to HFRRF, this supposedly will result in a reduced amount of contributions by the City to HFRRF. *See* Amended Petition at ¶¶ 39-40. HFRRF's argument is illogical because a higher rate of return means a lower investment would achieve the desired result. If the assumptions that HFRRF employed in its recent valuation are applied to the benefits and contributions provided in SB 2190, however, then the City would pay less than budgeted payments for fiscal year 2018. Thus, HFRRF cannot possibly be harmed by the adoption of an assumed 7 percent rate of return that requires the City to make more contributions to HFRRF, not less.

The only way HFRRF's irreparable injury argument makes any sense is by making two speculative assumptions: (1) the members' contribution rates and benefits in SB 2190 are disregarded and the lower rate contained in the pre-July 1, 2017 version of Article 6243e.2(1) applied; and (2) HFRRF's contribution rate cannot be reconciled with the City's contribution rate. The first assumption is both speculative and improper. HFRRF has not expressly challenged the constitutionality of the portion of SB 2190 changing benefits or increasing the members' contribution rate over that contained in the pre-July 1, 2017 version of the statute. Even if the portion of SB 2190 which HFRRF challenges were to be deemed unconstitutional, that does not make the entire statute unconstitutional. *See Geeslin v. State Farm Lloyds*, 255 S.W.3d 786, 797 (Tex. App.—Austin 2008, no pet.) ("[w]here severability is permissible, the unconstitutionality of one part of a statute should not invalidate the entire statute unless the unconstitutional provision is not separable from the remainder."). If HFRRF's proposed 7.25 percent rate of return were to be applied – which, of course, would be contrary to SB 2190 –

and SB 2190's provisions increasing the members' contribution rate and reducing their benefits are used – as they must be – it would result in a lower City contribution under SB 2190 than what the City has budgeted.

For the second assumption, in the absence of an RSVS by HFRRF it is pure speculation to assume that the initial risk sharing valuation studies required by SB 2190 will result in a difference of more than two percentage points for the City's contribution rate or that that difference cannot be reconciled by the actuaries for HFRRF and the City. If the difference is less than or equal to two percent or if the actuaries resolve their differences, which is the likeliest outcome, HFRRF has sustained no injury. And even if HFRRF were required to mathematically average its contribution rate because it is outside the 2 percent, any injury, of course, is only actionable if the portions of SB 2190 about which HFRRF complains are ultimately determined to be unconstitutional.

Inherent within the second speculative assumption HFRRF must make to promote its non-existing irreparable harm argument is the further speculative assumption that if at the end of fiscal year 2018 the actual contributions by the City are less than the estimated contributions, the City will not provide the necessary funding to make up the difference. This is not correct. Article 1.14 of SB 2190 sets forth the procedures to reevaluate the unfunded liability of the City from year to year and to reestablish mandated payments at appropriate levels the City will employ to make up any annual shortfalls in contributions. There is no reason and no basis to conclude now that the City would not comply with its obligations as provided in SB 2190 to address funding shortages. HFRRF therefore can only speculate as to whether it might be injured a year from now, by making the unsupported argument that HFRRF would have to "take on increased investment risks" if SB 2190 is not declared unconstitutional. *See* HFRRF's Brief

at 7. Such speculation is insufficient to support a temporary injunction. *Cf., Fox v. Tropical Warehouses, Inc.*, 121 S.W.3d 853, 861 (Tex. App.—Fort Worth 2003, no pet.) (holding that claim that sales would be undercut by competitor if competitor were not enjoined was too speculative to establish an irreparable injury).[6]

VI. TO THE EXTENT HFRRF MAY SUSTAIN AN "INJURY IN THE FUTURE," HFRRF HAS AN ADEQUATE REMEDY AT LAW

SB 2190 requires valuations by HFRRF and the City of the pension system requirements and the City's contributions. If the City fails to make its required contributions under SB 2190, HFRRF can seek mandamus against the officers of the City to compel compliance with the amended version of Article 6243e.2(1). *Cf., City of Houston*, 513 S.W.3d at 130. Mandamus is a legal remedy. *See Industrial Foundation of the South v. Tex. Indus. Acc. Bd.*, 540 S.W.2d 668, 674 (Tex. 1976); *In re Jindal Saw Ltd.*, 264 S.W.3d 755, 760 (Tex. App.—Houston [1st Dist.] 2008) (orig. proceeding). The fact that HFRRF will have to wait a year from now before it can exercise that remedy does not mean HFRRF lacks an adequate remedy. *See Salazar*, 304 S.W.3d at 909 n.11.

With respect to HFRRF's current complaints about SB 2190, HFRRF has an adequate remedy. It is the same remedy HFRRF told this Court in the 2014 *City of Houston v. Houston Firefighters'* Lawsuit that the City should seek to address the alleged unconstitutionality of

[6] HFRRF talks out of both sides of its mouth in arguing that it will suffer irreparable harm if an injunction does not issue to enjoin Defendants from complying with the presumptively constitutional SB 2190. On one hand, HFRRF argues that its alleged future harm is not capable of being measured. HFRRF's Br. at 7. On the other, HFRRF attached to its amended petition an affidavit purporting to calculate the precise dollar amount of contributions the City allegedly would have made if SB 2190 had not gone into effect; *i.e.*, the "damages" HFRRF claims it will sustain under SB 2190. *See* Amended Petition, Ex. 2. Similarly, HFRRF claims this amount cannot be recovered from the City because the City is immune from liability for damages at the same time HFRRF argues the City has no immunity from a mandamus action to compel the City to make the amount of contributions HFRRF claims the City shall be required to make. These inconsistent arguments only underscore the flawed nature of HFRRF's claim for injunctive relief.

Article 6243e.2(1). By substituting "HFRRF" for the "City," HFRRF's summary judgment brief spelled out the true remedy for the complaints HFRRF now makes about SB 2190:

> What HFRRF really opposes are the Legislature's considered judgments and the 1975 Constitutional Amendment that confirmed the Legislature's broad and long-standing power to establish pension systems. In essence, HFRRF has drafted a new pension fund statute more to its liking, and rather than propose it to the Legislature, HFRRF has submitted it to this Court. HFRRF asks this Court for extraordinary and unprecedented relief – to hold a pension statute unconstitutional and to write a new pension statute to take its place. But the Legislature has express constitutional authority to determine how to compensate public employees, including how to set compensation levels and how to fund that compensation.

See Ex. 1 at 35-36. HFRRF's application for a temporary injunction must be denied.

VII. BALANCING THE EQUITIES FURTHER DEMONSTRATES THAT HFRRF'S APPLICATION FOR A TEMPORARY INJUNCTION MUST BE DENIED

Nowhere in HFRRF's amended petition or brief is there any mention of the injury that will result to the **public** if the Court were to declare SB 2190 unconstitutional and grant HFRRF's application for a temporary injunction. The injury that will result to the public is a key element the Court must consider in balancing the equities. *Storey v. Cent. Hide & Rendering Co.*, 148 Tex. 509, 226 S.W.2d 615, 618-19 (1950).

The Legislature, not HFRRF, declares the public policy of the State of Texas. *See Martinez v. State*, 323 S.W.3d 493, 501 (Tex. Crim. App. 2010). The Legislature in its wisdom recognized the pension-related budgetary shortfalls jeopardizing the long-term sustainability of HFRRF, HPOPS, and HMEPS. *See* Ex. 3. Public policy concerns are "best resolved by the Legislature, not the judiciary." *Lawrence v. CDB Servs., Inc.*, 44 S.W.3d 544, 553 (Tex. 2001).

Every dollar that HFRRF seeks to have diverted to HFRRF under its meritless constitutional challenge to SB 2190 would be a dollar less that goes to other citizens of the City of Houston, including its police officers, municipal employees, and their dependents. HFRRF spent substantial sums lobbying against SB 2190, which passed the Legislature by a wide

margin. Again substituting "HFRRF" for the "City" in HFRRF's representations to the Court in 2014 demonstrates that balancing the equities favors the denial of the relief HFRRF seeks:

> To grant HFRRF's motion, the Court would have to ignore persuasive legislative history and Attorney General opinions, binding precedent, the plain language of the relevant statutes and constitutional provisions, and the settled rule that any "law duly enacted by the Legislature is presumed valid, and all doubts should be resolved in favor of its constitutionality." (citation omitted). This requested relief, as much as anything in its motion, shows the lack of merit in HFRRF's claims.

See Ex. 1 at 35-36.

VIII. CONCLUSION

For the reasons stated above, HFRRF's Application for a Temporary Injunction should be denied, the Defendants' pleas to the jurisdiction should be granted, and this lawsuit should be dismissed. Defendants seek all other and further relief to which they are entitled.

Respectfully submitted,

NORTON ROSE FULBRIGHT US LLP

By: Reagan M. Brown

Reagan M. Brown
State Bar No. 03162200
reagan.brown@nortonrosefulbright.com
Neil Thomas
State Bar No. 19869600
neil.thomas@nortonrosefulbright.com
Carter Dugan
State Bar No. 24056483
carter.dugan@nortonrosefulbright.com
1301 McKinney, Suite 5100
Houston, Texas 77010-3095
Telephone: (713) 651-5151
Facsimile: (713) 651-5246

CITY OF HOUSTON LEGAL DEPARTMENT
Ronald C. Lewis
City Attorney
Judith L. Ramsey
Chief, General Litigation Section

Patricia L. Casey
State Bar No. 03959075
pat.casey@houstontx.gov
Fernando De Leon
State Bar No. 24025325
fernando.deleon2@houstontx.gov

900 Bagby Street, 4th Floor
Houston, Texas 77002
Telephone: (832) 393-6491
Facsimile: (832) 393-6259

Attorneys for Defendants City of Houston, Sylvester Turner, 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

CERTIFICATE OF SERVICE

This pleading has been served upon all counsel of record in compliance with the Texas Rules of Civil Procedure on June 20, 2017:

George T. Shipley
Amy L. Snell
SHIPLEY SNELL MONTGOMERY LLP
712 Main Street, Suite 1400
Houston, Texas 77002
gshipley@shipleysnell.com
asnell@shipley@snell.com
Counsel for Plaintiff Houston Firefighters' Relief and Retirement Fund

Michael A. Shaunessy
McGINNIS LOCHRIDGE & KILGORE, L.L.P.
600 Congress Ave., Suite 2100
Austin, Texas 78701
MShaunessy@mcginnislaw.com
Counsel for Plaintiff Houston Firefighters' Relief and Retirement Fund

/s/ Reagan M. Brown
Reagan M. Brown