FILED
21-1037
7/5/2022 2:35 PM
tex-66022906
SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. 21-1037

IN THE SUPREME COURT OF TEXAS
IN AUSTIN

BRUCE R. HOTZE
Petitioner,

v.

SYLVESTER TURNER, MAYOR, AND THE CITY OF HOUSTON,
Respondents.

On Appeal from the 14th Court of Appeals, Harris County
No. 14-19-00959-CV
333rd Judicial District Court
Harris County, Texas No. 2014-19507
Honorable Randy Daryl L. Moore, Former Judge Presiding

PETITIONER BRUCE R. HOTZE'S BRIEF ON THE MERITS IN SUPPORT OF HIS PETITION FOR REVIEW

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ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

This Court has jurisdiction to consider this Petition for Review because it raises several issues that are important to the State's jurisprudence. Tex. Gov't Code § 22.001. First, the opinion of the court of appeals misapplies the law as to whether a City may disregard the majority vote of its electorate for a proposed charter amendment by municipal fiat and without voter authority to do so. In this case, two different proposed charter amendment changes were separately and independently passed by a majority of the electorate in separate votes. Nowhere in the text of the first proposed charter change (Proposition 1) did it indicate that it would trump another proposed charter change (Proposition 2), even if both proposed amendments passed by majority votes, so long as Proposition 1 garnered more votes than did Proposition 2. To the contrary, the City simply and gratuitously invented that provision post-election by municipal edict. Accordingly, the City disregarded Proposition 2 by relying on poison-pill language that was never submitted to the electorate for passage. If left standing, this case will provide a roadmap for cities to circumvent both constitutional and statutory authority which requires an "up or down vote" on each proposed city charter amendment submitted to the voters in the same election cycle. Second, this case muddies the line of legal demarcation

between what is and what is not included in an election contest. The Court of Appeals decision suggests that a citizen must bring this challenge no later than thirty (30) days after the canvass of the election. If left undisturbed, this opinion will turn a challenge to a city's refusal to enforce a charter amendment passed by a majority of the voters on its head. Election contests do not reach the question of whether the results of something that passed by the electorate should be enforced or not. To the contrary, contests focus on whether votes should or should not be counted, and whether the voting process was tainted. Where, as here, there is no challenge to the election process, the results of that election are outside the scope of such a challenge. Indeed, it would be nonsensical to require a citizen to bring a challenge within thirty (30) days, simply because the City's unwillingness to enforce the will of the voters in the election can be—and, in this case, was— delayed until after the expiration of that short time period. Third, the Court of Appeals decision muddies the water on how a Court must obey canons of statutory construction. Where, as here, an interpretation may reasonably be given which would harmonize both Propositions into peaceful co-existence, then that interpretation must be implemented. Had the Court of Appeals done so, then there would be no basis to eradicate Proposition 2. This Court should accept this case and issue a decision that puts these concerns to rest.

STATEMENT OF THE CASE

Nature of Underlying Proceeding: Taxpayer suit for declaratory and injunctive relief to validate and enforce a City of Houston charter amendment known as Proposition 2. Upon his determination that a poison pill provision in a separate charter amendment known as Proposition 1 rendered Proposition 2 ineffective, the Trial Court, Judge Moore, Presiding Judge of the 33rd Civil District Court of Harris County, entered a take-nothing judgment. A majority of the 14th Court of Appeals affirmed, with one Justice dissenting.

Action from which relief requested: Petitioner seeks review of the 14th Court of Appeals' judgment dated October 12, 2021 (see Tabs A and B, which are the majority and dissenting opinions, respectively), which erroneously affirms the Trial Court's Final Judgment dated October 29, 2019 (see Appendix, Tab C), which incorporates by reference a previous order denying Petitioner's motion for summary judgment, dated September 16, 2019 (see Appendix, Tab C). Seeking to reverse and render the Court of Appeals' erroneous affirmance of the Trial Court's judgment and order which found that Proposition 2 is not effective, Petitioner asserts four (4) basic arguments: (1) Proposition 2 is not rendered ineffective by Proposition 1's poison pill provision because that specific provision was never included within the text of Proposition 1 itself

and therefore not voted upon by the electorate; (2) even if Proposition 1's poison pill provision was included within the text of Proposition 1, that specific provision was never triggered by the language contained within Proposition 2; (3) even if Proposition 1's poison pill provision was included within the text of Proposition 1--and even if it was applicable to Proposition 2--Proposition 2 is nevertheless valid and enforceable because the poison pill provision conflicts with the Texas Constitution and state law and is therefore unconstitutional and void; (4) even if Proposition 1's poison pill provision was included within the text of Proposition 1--and even if it was applicable to Proposition 2--Proposition 2 is nevertheless valid and enforceable because: either (a) there is no irreconcilable inconsistency so as to trigger a local charter provision that mandates the proposition receiving the highest number of votes must trump the other proposition; or (b) notwithstanding a finding of inconsistency, that local charter provision is nevertheless ineffective because it conflicts with the Texas Constitution and a state statute and is therefore unconstitutional and void as applied.

PROCEDURAL POSTURE OF THIS CAUSE AND LIMITATIONS OF THIS PETITON FOR REVIEW

This is a Brief on the Merits in support of Petitioner Hotze's Petition for Review—who was one of three plaintiffs below[1]—of both the Court of Appeals' affirmance and the Trial Court's entry of Final Judgment, which resulted in a take-nothing judgment on all of Petitioner's claims arising under both Proposition 1 and Proposition 2. 3 CR 2032. The Trial Court signed the Final Judgment in this case on October 29, 2019, which incorporated its prior September 16, 2019 Order addressing the parties' cross-motions for summary judgment.

The Trial Court's Take-Nothing Judgment is the byproduct of two separate events: (1) an evidentiary bench trial on the merits whereby the Trial Court found that the Respondents had complied with Proposition 1 (1 RR 1-226); and (2) a prior interlocutory summary judgment ruling that Proposition 2 is not effective due to Proposition 1's poison pill provision which states "[i]f another proposition for a Charter amendment relating to limitations on increases in City revenues is approved at the same election at which this proposition is also approved, and if this proposition receives the

[1] Hotze's co-plaintiff, Carroll Robinson, did not appeal the Trial Court's Final Judgment. The third plaintiff, Jeffrey N. Dailey, passed away prior to trial.

higher number of favorable votes, then this proposition shall prevail and the other shall not become effective." (3 CR 2031).

Petitioner Hotze did not appeal that portion of the Trial Court's Final Judgment which, after conducting an evidentiary bench trial (1 RR 1-226), determined that Respondents have complied with Proposition 1. Accordingly, that portion of the Trial Court's Final Judgment is not before this Court. Instead, Petitioner's Petition for Review is focused solely on the Trial Court's summary judgment ruling regarding Proposition 2, and seeks this Court's review of both the 14th Court of Appeals' affirmance—as well as the Trial Court's erroneous summary judgment conclusion—that Proposition 2 is not effective[2].

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[2] In its Order dated September 16, 2019, which was incorporated into the October 29, 2019 Final Judgment, the Trial Court also determined that: (1) Hotze has taxpayer standing to seek declaratory and injunctive relief pertaining to Proposition 2; and (2) Propositions 1 and 2 are neither irreconcilably nor substantively inconsistent, such that Article IX, Section 19 of the City Charter is not applicable. 3 CR 2031-2032. Petitioner Hotze does not challenge these favorable findings, but, to the contrary, supports them. Although the Respondents herein did not file a Cross-Petition for Review that attacks these findings, they did assign error to these findings in their briefing before the Court of Appeals. The Court of Appeals did not reach the Respondents' issues, however. Petitioner Hotze nevertheless raised these issues in his Petition for Review and referenced them as issues which had been resolved by the Trial Court in support of the Trial Court's findings and that such findings were favorable to Hotze. See Hotze's Petition for Review, page 8, n. 2. In Respondents' Response to Petitioner Hotze's Petition for Review, Respondents waived any further complaint about whether Petitioner Hotze possesses standing, as it was not raised. As such, it is not necessary to brief that issue here. However, should the Respondents raise this issue as an independent ground for affirmance in its Response Brief on the merits, then Petition Hotze reserves the right to brief this specific issue in its Reply Brief on the Merits. *In the meantime, given that Respondents did raise three (3) unbriefed issues, which the Court of Appeals failed to address, Petitioner's Brief on the Merits will address those issues herein, and asks this*

ISSUES PRESENTED

ISSUE NUMBER ONE

The Court of Appeals affirmed the Trial Court's entry of a Take-Nothing Judgment on the basis that Proposition 1's poison pill provision renders Proposition 2 ineffective. The Texas Constitution only permits the City of Houston to amend its City Charter by a majority vote of the electorate, rather than by City Council fiat. Given that the poison pill provision was never included within the text of Proposition 1 (not in the election ordinance, not in the ballot language, not in the newspaper publication notice, and not in the canvassing ordinance), which was written by the City and submitted to the voters, did the Court of Appeals and the Trial Court both err in denying Petitioner's Motion for Summary Judgment and granting Respondents' Motion for Summary Judgment?

ISSUE NUMBER TWO

The Court of Appeals affirmed the Trial Court entry of a Take-Nothing Judgment on the basis that Proposition 1's poison pill provision renders Proposition 2 ineffective. Proposition 1's poison pill provision only applies to a proposition "relating to limitations on increases in City revenues." By failing to find that Proposition 2 does not relate to limitations

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Court to resolve those issues in lieu of remanding them to the Court of Appeals. T.R.A.P. 53.4.

on increases in City revenues, did the Court of Appeals and the Trial Court both err in denying Petitioner's Motion for Summary Judgment and granting Respondents' Motion for Summary Judgment?

ISSUE NUMBER THREE

The Court of Appeals affirmed the Trial Court's entry of a Take-Nothing Judgment on the basis that Proposition 1's poison pill provision renders Proposition 2 ineffective. Article XI §5 of the Texas Constitution invalidates the passage of charter amendments which conflict with the Texas Constitution and/or state law. Given that state law requires each proposed charter amendment to be adopted if it passes by a majority of the electorate (an up or down vote), and given that the effect of Proposition 1's poison pill provision is to render Proposition 2 ineffective (top vote getter results in winner take all), despite the fact that both propositions received a majority of the vote, did the Court of Appeals and the Trial Court both err in denying Petitioner's Motion for Summary Judgment and granting Respondents' Motion for Summary Judgment?

ISSUE NUMBER FOUR

Instead of simply remanding this case to consider issues previously briefed but not reached below, this Court should, in the interests of justice, determine that, because Propositions 1 and 2 are not inconsistent, the Trial

Court correctly reconciled these charter amendments in order to avoid a determination that Article IX, Section 19 of the Houston City Charter is unconstitutional.

ISSUE NUMBER FIVE

Furthermore, and in the alternative, should this Court find that Article IX, Section 19 of the Houston City Charter does apply, then this Court should declare that this charter provision conflicts with both the Texas Constitution and state law and is therefore void and unenforceable.

ISSUE NUMBER SIX

The Respondents are wrong in their assertion that no pleading supports the declaratory relief granted by the Trial Court and additional relief is warranted.

ISSUE NUMBER SEVEN

Because Petitioner's Traditional Motion for Summary Judgment to validate and enforce Proposition 2 should have been granted, both the Court of Appeals and the Trial Court judgment should be reversed and rendered in Petitioner's favor, and the cause should be remanded to consider an award of attorneys' fees to Petitioner.

STATEMENT REGARDING ORAL ARGUMENT

Petitioner believes oral argument will be helpful to the Court in determining whether the lower courts erred in finding that Proposition 1's poison pill provision renders Proposition 2 ineffective.

STANDARD OF REVIEW

Appellate review of a summary judgment is de novo. Where both sides file motions for summary judgment and the trial court grants one and denies the other, the appellate court reviews the evidence submitted by both parties, determines all questions presented, and renders the judgment that the trial court should have rendered. *Dow Chem. Co. v. Bright*, 89 S.W.3d 602, 605 (Tex. 2002); *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000).

SUMMARY OF THE ARGUMENT

The lower courts erred by denying Petitioner's Traditional Motion for Summary Judgment seeking to validate and enforce Proposition 2, and both courts also erred by granting Respondents' Motion for Summary Judgment. Petitioner Hotze raises four arguments in support of his Petition for Review.

With respect to **Issue Number One,** a majority of those voting on whether to amend Houston's City Charter voted in favor of the passage of both Propositions 1 and 2. The Respondents refuse to comply with

Proposition 2 by arguing that Proposition 1 contains certain language which trumps Proposition 2 ("the poison pill provision"). More specifically, this poison pill provision states that "[i]f another proposition for a Charter amendment relating to limitations on increases in City revenues is approved at the same election at which this proposition is also approved, and if this proposition receives the higher number of favorable votes, then this proposition shall prevail and the other shall not become effective." Thus, the Respondents contend that, because Proposition 1 received more votes than did Proposition 2, Proposition 1 prevails but Proposition 2 never became effective. Contrary to the Court of Appeals' assertion that no authority exists to support Petitioner's view, both Article XI § 5 Texas Constitution, as well as Section 9.005(a) of the Texas Local Government Code, prohibit the City from amending its City Charter without a majority vote of the electorate. Because the text of Proposition 1 that was submitted for voter approval did not include the poison pill provision, but was instead authored solely by the City, this provision cannot operate to invalidate Proposition 2 as a matter of law.

With respect to **Issue Number Two,** in the alternative to Issue Number One, even if this poison pill provision was somehow included within the text of Proposition 1, which Petitioner denies, the applicable

language "relating to limitations on increases in City revenues" was never triggered. More specifically, Proposition 1 and Proposition 2 impact different phases of the budgeting process. Proposition 1 solely relates to limitations on the assessment and collection of property tax revenues, while Proposition 2 does not limit any increases in City revenues whatsoever. To the contrary, Proposition 2 relates to the necessity for prior voter approval before total spending in any given budget year may exceed a particular mathematical formula. Because Proposition 2 does not limit "increases in City revenues," Proposition 1's poison pill provision cannot render Proposition 2 ineffective as a matter of law.

With respect to **Issue Number Three,** should this Court find as a matter of law that: (i) the poison pill provision exists within the text of Proposition 1 (thereby disagreeing with Petitioner's Issue Number One above) and (ii) is applicable (thereby disagreeing with Petitioner's Issue Number Two above), then Petitioner alternatively contends that Proposition 1's poison pill provision is void and unenforceable under Article XI § 5 Texas Constitution and/or Section 9.005(a) of the Texas Local Government Code, as applied to the facts of this case, because such provision conflicts with both the Texas Constitution and state law.

With respect to **Issue Number Four**, in its Order dated September 16, 2019, which was incorporated into the October 29, 2019 Final Judgment, the Trial Court correctly determined that Propositions 1 and 2 are neither irreconcilably nor substantively inconsistent, such that Article IX, Section 19 of the City Charter is not applicable. 3 CR 2031-2032. Petitioner Hotze does not appeal these findings, but, to the contrary, supports them. The Trial Court correctly found that Propositions 1 and 2 are neither irreconcilably nor substantively inconsistent with one another. In so doing, the Trial Court obeyed its duty under well recognized canons of statutory construction, which require a court to avoid questions of constitutionality if there is a reasonable basis to harmonize statutes in a manner so as to avoid striking down a law. As was demonstrated by Hotze's filings in the Trial Court, no factual or legal inconsistency exists between Proposition 1 and Proposition 2. For example, Proposition 1 and Proposition 2 impact different phases of the budgeting process. Proposition 1 solely relates to limitations on the assessment and collection of property tax revenues, while Proposition 2 does not limit any increases in City revenues whatsoever. To the contrary, Proposition 2 relates to the necessity for prior voter approval before total spending in any given budget year may exceed a particular mathematical formula.

With respect to **Issue Number Five**, should this Court find as a matter of law that Propositions 1 and 2 are irreconcilably and substantively inconsistent, which Petitioner Hotze denies, doing so will require the Court to reach the issue of whether Article IX, Section 19 of the Houston City Charter is unconstitutional. In that regard, Petitioner Hotze contends that this specific charter provision is void and unenforceable under Article XI § 5 Texas Constitution and/or Section 9.005(a) of the Texas Local Government Code, as applied to the facts of this case, because such provision conflicts with both the Texas Constitution and state law.

With respect to **Issue Number Six,** both the Court of Appeals and the Trial Court erred by not granting Petitioner's Traditional Motion for Summary Judgment. Because all parties filed cross-motions for summary adjudication, this Court may review the denial of Petitioner's Motion for Summary Judgment and render judgment that Trial Court should have rendered, e.g., a declaration that: (i) Proposition 2 is valid and enforceable; (ii) the poison pill provision was never included within the text of Proposition 1; (iii) the poison pill provision was never submitted nor passed by a majority of the Houston electorate; (iv) therefore the poison pill provision is not a part of Proposition 1; (v) the City's budget ordinances for FY 2011 thru FY 2019 exceed the cap of Proposition 2; and (vi) to the extent

not yet spent, then all said amounts must be placed in a segregated taxpayer account pending an election, or, alternatively, returned to the taxpayers.

With respect to **Issue Number Seven**, should this Court agree that the Court of Appeals erred on the issues it decided, and should this Court also agree that the other findings by the Trial Court were correct, than this cause should be remanded to the Trial Court solely for a determination of whether attorneys' fees should be awarded to the Petitioner.

STATEMENT OF FACTS[3]

Petitioner Bruce R. Hotze organized a petition drive for a citizen-initiated revenue cap known as Proposition 2. He also assisted with drafting the final wording of the referendum and financially supported this effort. Petitioner Hotze signed the petition and worked on the "Let the People Vote" and "Vote Yes on Prop 2" campaigns to ensure the passage of Proposition 2.

On November 2, 2004, registered voters of the City of Houston were asked to vote on a Proposition relating to limits on annual increases in city property taxes and utility rates in the City of Houston ("Proposition 1") and

[3] Petitioner's Statement of Facts is supported by the sworn affidavit of Bruce R. Hotze. 2 CR 907, 962-976. This Statement of Facts is further supported by the documents which were attached Plaintiff's Traditional Motion for Summary Judgment, namely, Plaintiffs' Exhibits 1A thru 1K. 2 CR 977-1335. Finally, with respect to the mathematical calculations regarding non-compliance with Proposition 2, this Statement of Facts is supported by the sworn affidavit of Bruce Hotze and also Robert S. Lemer. 2 CR 962-976, 1336-1362.

another Proposition relating to limits on all combined city revenues ("Proposition 2"). The words within the above-referenced quotation marks were written by the City of Houston, not the voters. The ballot language for Proposition 1 states:

> The Charter of the City of Houston shall be amended to require voter approval before property tax revenues may be increased in any future fiscal year above a limit measured by the lesser of 4.5% or the cumulative combined rates of inflation and population growth. Water and sewer rates would not increase more than the cumulative combined rates of inflation and population growth without prior voter approval. The Charter Amendment also requires minimum annual increases of 10% in the senior and disabled homestead property tax exemptions through the 2008 tax year.[4]

The ballot language for Proposition 2 states:

> The City Charter of the City of Houston shall be amended to require voter approval before the City may increase total revenues from all sources by more than the combined rates of inflation and population, without requiring any limit of any specific revenue source, including water and sewer revenues, property taxes, sales taxes, fees paid by utilities and developers, user fees, or any other sources of revenue.[5]

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[4] The actual verbatim language of both Proposition 1 and Proposition 2 is set forth within quotation marks in Plaintiffs' Exhibit 1A, which is a true and correct copy of City of Houston Ordinance No. 2004-0887. 2 CR 977-995. This particular Ordinance is referred to herein as the "Election Ordinance," because it ordered a Special Election to occur on November 2, 2004. In addition to the verbatim language of both Proposition 1 and 2, this Election Ordinance also includes the ballot language which was used during the Special Election to describe both propositions. As indicated by City Secretary Anna Russell's certification on the last page, the Houston City Council passed this Election Ordinance on August 25, 2004. 2 CR 995.

[5] Proposition 2 in its entirety can also be found within quotation marks in Plaintiffs' Exhibit 1A. 2 CR 981-984.

Voters were permitted to either vote "FOR" or "AGAINST" both propositions (i.e., voters could vote for both propositions, voters could vote against both propositions, or voters could vote for one, but not both, propositions). According to the official canvass report from the Harris County Clerk's office, the vote breakdown was as follows:

	Proposition 1	Proposition 2
FOR	280, 596 63.95%	242,697 56.46%
AGAINST	158, 152 36.05%	187, 169 43.54%

As is evidenced above, both Propositions passed by a majority of votes (i.e., Proposition 1 passed with 63.95% of the vote and Proposition 2 passed with 56.46% of the vote).[6] But despite the passage of Proposition 2, the City of Houston refused to enter an order adopting its passage, and further refused to certify the results of its passage to the Texas Secretary of State. Thus, in order to force the issue, Plaintiffs brought a petition for writ of mandamus to compel these actions to occur. On April 14, 2005, the Houston First Court of Appeals, in Cause Nos. 01-04-01276-CV and 01-05-00374-CV, ruled in Plaintiffs' favor, finding that article 9.005(b) of the

[6] The certified results of the Special Election for both propositions can be found in Plaintiffs' Exhibit 1B, which is a true and correct copy of City of Houston Ordinance No. 2004-1168, which will be referred to herein as the "Canvassing Ordinance." 2 CR 996-1006.

Local Government Code "imposes a nondiscretionary duty on City Council to enter an order in the records of the City of Houston declaring that propositions 1, 2 and 3 have been adopted." *See In re Robinson*, 175 S.W.3d 824, 826-27 (Tex. App.—Houston [1st Dist.] 2005, orig. proceeding). The appellate court held that the then-Mayor had a non-discretionary duty to certify all the amendments, including Proposition 2, to the Secretary of State. *Id.* at 829-30 (citing Tex. Loc. Gov't Code Ann. § 9.007(a). The court also held that Houston City Council had a non-discretionary duty to enter an order in the City records declaring all the propositions had been adopted by voters. *Id*. at 830-32 (citing Tex. Loc. Gov't Code Ann. § 9.005). Shortly after the Court of Appeals' opinion was issued, specifically, on May 4, 2005, the City of Houston passed Ordinance No. 2005-568, which, in part, fulfilled the ministerial duties order by the Court of Appeals with respect to Proposition 2 (with one very significant exception, which will be explained on Page 20, below). Thus, under Section 9.005(a) of the Local Government Code, both Proposition 1 and Proposition 2 became part of the City Charter. *See* TEX. LOCAL GOV'T CODE § 9.005(a).

Prior to the November General Election, the Houston City Council passed an Ordinance calling for a Special Election. 2 CR 977 (Plaintiffs' Exhibit 1A (the "Election Ordinance")). ***In that Election Ordinance, the***

actual text of Proposition 1 is referenced within quotation marks. Immediately following the quotation marks, the Election Ordinance contains the following poison pill provision: "[i]f another proposition for a Charter amendment relating to limitations on increases in City revenues is approved at the same election at which this proposition is also approved, and if this proposition receives the higher number of favorable votes, then this proposition shall prevail and the other shall not become effective." 2 CR 981. ***Significantly, this poison pill provision is not contained within the quoted portion of the Election Ordinance.*** To the contrary, the poison pill provision is gratuitously listed after the closed quotation marks. This necessarily means that the poison pill provision was not intended and indeed was not part of the text of Proposition 1. Moreover, the exact same municipal language contained within the quotation marks of the Election Ordinance is also contained within the quoted text of Proposition 1 that was published in the October 10 and October 17, 2004 editions of the Houston Chronicle. 2 CR 1007-1009 (Plaintiffs' Exhibit 1-C).[7] No reference to the poison pill provision can be found in the newspaper publications, making it absolutely impossible for the Petitioner or anyone else in the electorate to

[7] Section 9.004(c) of the Local Government Code requires a "substantial copy of the proposed amendment" to be published in the newspaper. Omission of the poison pill provision obviously demonstrates that the City did not consider that language to be a part of the proposed Charter Amendment.

have any notice or knowledge whatsoever that an affirmative vote for Proposition 1 would necessarily negate an affirmative vote for Proposition 2, should Proposition 1 receive more favorable votes than Proposition 2. Finally, after the November Special Election, the Houston City Council passed an ordinance declaring the results of the election (the "Canvassing Ordinance") and setting forth verbatim the text of the statutes which had been passed by a majority of those voting. 2 CR 996 (Plaintiffs' Exhibit 1B). **Conspicuously absent is any reference to the poison pill provision** relied upon by the Respondents to jettison Proposition 2 and to disenfranchise Petitioner Hotze and all of the rest of the Houston voters who voted in the 2004 Special Election. Simply put, somebody dropped the ball—the poison pill provision was never included within the text of Proposition 1—before, during or after the Special Election in November, 2004. Thus, the poison pill provision is not part of Proposition 1[8]. Thus, as a matter of law the poison pill provision is not part of Proposition 1.

In yet another sleight of hand attempt to destroy Proposition 2, the City of Houston passed Ordinance No. 2005-568 on May 4, 2005. 1 CR 58,

[8] Prior counsel for the Respondents specifically conceded that the poison pill provision was not a part of the proposed amendments to the City Charter. 2 CR 962. See Reporter's Record of June 2, 2005 hearing in Cause No. 2004-72705, p. 47, lines 15-17; page 56, lines 11-13; page 57, lines 5-6 and 15-18. Upon examination by the Trial Court, Defendants' counsel conceded that the current version of the City Charter does not contain any poison pill provision. Id. at page 57, lines 15-18.

160. Interestingly, this Ordinance came on the heels of Plaintiffs' victory in the mandamus case. The body of the Ordinance suggests that this is the Adoption Ordinance that the Court of Appeals had just ruled needed to be entered, but it includes, in the 8th whereas clause, the following intentional misrepresentation:

> WHEREAS, Proposition 1 included the following language: "If another proposition for a Charter amendment relating to limitations on increases in City revenues is approved at the same election at which this proposition is also approved, and if this proposition is also approved, and if this proposition receives the higher number of favorable votes, then this proposition shall prevail and the other shall not become effective";

1 CR 162. As explained already, this is a false statement. Proposition 1 never included this statement, and simply declaring that Proposition 1 does include the poison pill provision by City Council fiat does not make it true. Indeed, this Adoption Ordinance was crafted by Scott Atlas, the lawyer representing then-Mayor White and the City of Houston, who had every reason and incentive to make this false claim, given that Plaintiffs were saying the exact opposite in court. Indeed, the document identifier in the footer of that exhibit demonstrates that Scott Atlas is the author of the self-serving document.

Petitioner contends that the poison pill provision, even if included in Proposition 1, is not applicable, simply because the phrase "relating to

limitations on increases in City revenues" was never triggered. More specifically, Proposition 1 and Proposition 2 impact different phases of the budgeting process. 2 CR 975. Proposition 1 solely relates to limitations on the assessment and collection of property tax revenues, while Proposition 2 does not limit any increases in City revenues whatsoever. 2 CR 975. To the contrary, Proposition 2 relates to the necessity for prior voter approval before total spending in any given budget year may exceed a particular mathematical formula. 2 CR 975. Thus, Proposition 2 does not limit "increases in City revenues."

With respect to his claims for declaratory and injunctive relief, Petitioner Hotze submitted evidence in support of his Traditional Motion for Summary Judgment that the City's annual budgets—which are voted on, passed by majority vote of the Houston City Council, and signed into law by the Houston Mayor as enacted ordinances—were passed for Fiscal Years 2006 thru 2019 in excess of the cap contained in Proposition 2. 2 CR 262-976 (Hotze affidavit, including paragraphs 9-12, pages 968-971); 2 CR 1029-1095 (budget ordinances); 2 CR 1096-1102 (summary charts); and 2CR 1336-1362 (Lemer affidavit and attachments). Moreover, Petitioner Hotze submitted evidence that each of the annual budgets which were passed for Fiscal Years 2006 thru 2019 violate Proposition 2 because those budgets

failed to certify compliance with Proposition 2's charter-imposed requirements, such as certification by the City Controller prior to passage of the budget ordinances and certification by the City's outside auditors within four months of the passage of the budget ordinances, that each such budget was within the caps contained in that Proposition (the City Charter is the constitution at the local level). 2 CR 962-976 (Hotze affidavit, including paragraphs 9-12, pages 968-971). Accordingly, summary judgment should have been granted on the basis that the permissible caps contained within Proposition 2 were exceeded.

ARGUMENT AND AUTHORITIES

I. THE COURT OF APPEALS AFFIRMED THE TRIAL COURT'S ENTRY OF A TAKE-NOTHING JUDGMENT ON THE BASIS THAT PROPOSITION 1'S POISON PILL PROVISION RENDERED PROPOSITION 2 INEFFECTIVE. THE TEXAS CONSTITUTION ONLY PERMITS THE CITY OF HOUSTON TO AMEND ITS CITY CHARTER BY A MAJORITY VOTE OF THE ELECTORATE, RATHER THAN BY CITY COUNCIL FIAT. GIVEN THAT THE POISON PILL PROVISION WAS NEVER INCLUDED WITHIN THE TEXT OF PROPOSITION 1 (NOT IN THE ELECTION ORDINANCE, NOT IN THE BALLOT LANGUAGE, NOT IN THE NEWSPAPER PUBLICATION NOTICE, AND NOT IN THE CANVASSING ORDINANCE), WHICH WAS WRITTEN BY THE CITY AND SUBMITTED TO THE VOTERS, DID THE COURT OF APPEALS AND THE TRIAL COURT BOTH ERR IN DENYING PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT?

A majority of those voting on whether to amend Houston's City Charter voted in favor of the passage of both Propositions 1 and 2. The Respondents attempt to escape the consequences of having to comply with Proposition 2 by arguing that Proposition 1 contains certain language which trumps Proposition 2 ("the poison pill provision"). More specifically, this poison pill provision states that "[i]f another proposition for a Charter amendment relating to limitations on increases in City revenues is approved at the same election at which this proposition is also approved, and if this proposition receives the higher number of favorable votes, then this proposition shall prevail and the other shall not become effective." Thus, Petitioner contends that, because Proposition 1 received more votes than did Proposition 2, Proposition 1 survives but Proposition 2 does not survive.

Contrary to the Court of Appeals' assertion that no authority exists to support Petitioner's view, both Article XI § 5 Texas Constitution, as well as Section 9.005(a) of the Texas Local Government Code, prohibit the City from amending its City Charter without a majority vote of the electorate. Because the text of Proposition 1 that was submitted for voter approval did not include the poison pill provision, but was instead authored solely by the City, this provision cannot operate to invalidate Proposition 2 as a matter of law.

Prior to the November General Election, the Houston City Council passed an Ordinance calling for a Special Election. See Plaintiffs' Exhibit 1A (the "Election Ordinance"). *In that Election Ordinance, the actual text of Proposition 1 is referenced within quotation marks.* Immediately following the quotation marks, the Election Ordinance contains the following poison pill provision: "[i]f another proposition for a Charter amendment relating to limitations on increases in City revenues is approved at the same election at which this proposition is also approved, and if this proposition receives the higher number of favorable votes, then this proposition shall prevail and the other shall not become effective." *Significantly, this poison pill provision is not contained within the quoted portion of the Election Ordinance.* To the contrary, the poison pill provision is gratuitously listed <u>after</u> the closed quotation marks. This necessarily means that the poison pill provision was not intended and indeed was not part of the text of Proposition 1. Moreover, the exact same municipal language contained within the quotation marks of the Election Ordinance is also contained within the quoted text of Proposition 1 that was published in the October 10 and October 17, 2004 editions of the Houston Chronicle. See Exhibit 1C.[9] No reference to the

[9] The Court of Appeals erroneously misinterprets Petitioner's argument as an election contest seeking to challenge the ballot language for Proposition 2. A challenge to ballot language would occur if Petitioner was complaining that the actual text of the proposition

poison pill provision can be found in the newspaper publications, making it absolutely impossible for the Petitioner or anyone else in the electorate to have any notice or knowledge whatsoever that an affirmative vote for Proposition 1 would necessarily negate an affirmative vote for Proposition 2, should Proposition 1 receive more favorable votes than Proposition 2. Finally, after the November Special Election, the Houston City Council passed an ordinance declaring the results of the election (the "Canvassing Ordinance") and setting forth verbatim the text of the statutes which had been passed by a majority of those voting. See Exhibit 1B. Conspicuously absent is any reference to the poison pill provision now relied upon by the Respondents to jettison Proposition 2 and to disenfranchise Houston voters. Simply put, somebody dropped the ball—the poison pill provision was never included in the text of Proposition 1—before, during or after the Special Election in November, 2004. Thus, as a matter of law the poison pill provision is not part of Proposition 1.

II. THE COURT OF APPEALS AFFIRMED THE TRIAL COURT ENTRY OF A TAKE-NOTHING JUDGMENT ON THE BASIS THAT PROPOSITION 1'S POISON PILL PROVISION RENDERED PROPOSITION 2

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was not fairly and accurately captured by the ballot language. Where, as here, Petitioner is not complaining about the ballot language, but contends that the ballot language is accurate, then the crux of the complaint cannot properly be characterized as an election contest. To the contrary, Petitioner is contending that the "poison-pill language" is missing because it was never considered to be part of the charter amendment to be voted on by the electorate.

INEFFECTIVE. PROPOSITION 1'S POISON PILL PROVISION ONLY APPLIES TO A PROPOSITION "RELATING TO LIMITATIONS ON INCREASES IN CITY REVENUES." BY FAILING TO FIND THAT PROPOSITION 2 DOES NOT RELATE TO LIMITATIONS ON INCREASES IN CITY REVENUES, DID THE COURT OF APPEALS AND THE TRIAL COURT BOTH ERR IN DENYING PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT?

In the alternative to Issue Number One, even if this poison pill provision was somehow included within the text of Proposition 1, which Petitioner denies, the applicable language "relating to limitations on increases in City revenues" was never triggered. More specifically, Proposition 1 and Proposition 2 impact different phases of the budgeting process. Proposition 1 solely relates to limitations on the assessment and collection of property tax revenues, while Proposition 2 does not limit any increases in City revenues whatsoever. To the contrary, Proposition 2 relates to the necessity for prior voter approval before total spending in any given budget year may exceed a particular mathematical formula. Thus, Proposition 2 does not limit "increases in City revenues."[10]

[10] Indeed, even the City recognized the difference when it choose the location for each proposition, should it pass at the November 2, 2004 Special Election. More specifically, the City placed Proposition 1 under Article III of the Houston City Charter, which deals with taxation. However, Proposition 2 was placed in Article VI-a, which deals with the City's annual budgets.

III. THE COURT OF APPEALS AFFIRMED THE TRIAL COURT'S ENTRY OF A TAKE-NOTHING JUDGMENT ON THE BASIS THAT PROPOSITION 1'S POISON PILL PROVISION RENDERS PROPOSITION 2 INEFFECTIVE. ARTICLE XI §5 OF THE TEXAS CONSTITUTION INVALIDATES THE PASSAGE OF CHARTER AMENDMENTS WHICH CONFLICT WITH THE TEXAS CONSTITUTION AND/OR STATE LAW. GIVEN THAT STATE LAW REQUIRES EACH PROPOSED CHARTER AMENDMENT TO BE ADOPTED IF IT PASSES BY A MAJORITY OF THE ELECTORATE (AN UP OR DOWN VOTE), AND GIVEN THAT THE EFFECT OF PROPOSITION 1'S POISON PILL PROVISION IS TO RENDER PROPOSITION 2 INEFFECTIVE (TOP VOTE GETTER RESULTS IN WINNER TAKE ALL), GIVEN THE FACT THAT BOTH PROPOSITIONS RECEIVED A MAJORITY OF THE VOTE, DID THE COURT OF APPEALS AND THE TRIAL COURT BOTH ERR IN DENYING PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT?

The poison pill provision is void and unenforceable on several grounds. First, the Local Government Code, a state statute, addresses city charters. Section 9.004(d) prohibits an amendment from containing more than one subject. Section 9.004(e) requires the ballot to be prepared so that a voter may approve or disapprove any one or more amendments without having to approve or disapprove all of the amendments. If the poison pill provision stands, then Section 9.004 has been violated in two respects. First, Proposition 1 should have made clear that its passage would cause the "inconsistency" requirement in Article IX, Section 19 of the City Charter to

be repealed. Second, the ballot was improperly prepared because it prohibited voters from approving Proposition 2 by only voting on Proposition 2; to the contrary, because of the poison pill provision, voters who choose to vote in favor of Proposition 2 could not stop there; they would also have to vote against Proposition 1 in order to ensure that their favorable vote for Proposition 2 would not be eradicated.

The poison pill provision states that "[i]f another proposition for a Charter amendment relating to limitations on increases in City revenues is approved at the same election at which this proposition is also approved, and if this proposition receives the higher number of favorable votes, then this proposition shall prevail and the other shall not become effective." This requires a voter who is voting for Proposition 2 to also vote against Proposition 1, thereby hoping that Proposition 2 will get the greater number of affirmative votes, thus making it impossible for Proposition 1 to prevail. This the City of Houston could not do. *See Ladd v. Yett*, 273 S. W. 1006, 1011-12 (Tex. Civ. App. –Austin 1925, writ dism'd w.o.j.)(stating that whether a charter amendment has passed depends upon the specific vote for or against it, irrespective of the total number of votes that may have been cast in the election). Because "it was the intention of the Legislature that each proposed amendment should be by the voters considered separately,"

by placing Proposition 1 (with the inclusion of the poison pill provision) and Proposition 2 on the ballot, the City has violated § 9.004 of the Local Government Code. *See id*. at 1012; *see also In re Robinson*, 175 S.W. 824 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

Assuming the poison pill provision is in fact a part of Proposition 1 (which it is not, as detailed above), the inclusion of such a provision causes this particular provision of Proposition 1 to be void and unenforceable. In addition to violating § 9.004(e) of the Local Government Code, Petitioner contends that the poison pill provision allegedly included in Proposition 1 is unenforceable under Tex. Const. art. XI § 5 (2004) or § 9.005(a) of the Local Government Code. More specifically, according to the Texas Constitution, "…no charter or any ordinance passed under said chapter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State." Tex. Const. art. XI § 5 (2004); *see also Berry v. City of Fort Worth*, 124 S.W.2d 842, 845-846 (Tex. 1939) (finding that it was error for lower court to hold that ordinance in question regarding police power of the City of Fort Worth was not in violation of Constitution and was valid). This section of the Texas Constitution makes clear that the Texas Constitution and the laws passed by the Legislature supersede and prevail over inconsistent provisions contained

in city charters. Thus, a city charter amendment cannot survive if it conflicts with a state statute (i.e., a Local Government Code provision) or a constitutional provision.

In addition, state law requires that "[a] proposed charter for a municipality or a proposed amendment to a municipality's charter ***is adopted if it is approved by a majority of the qualified voters*** of the municipality who vote at an election held for that purpose." TEX. LOCAL GOV'T CODE § 9.005(a)(emphasis added). Propositions 1 and 2 were both adopted by a majority of the voters of the City of Houston on November 2, 2004. Thus, under Section 9.005(a), both Propositions must be enacted. However, should the poison pill provision be found to exist and to apply, then Proposition 2 will not be effective, in total derogation of Section 9.005(a). Thus, this provision, if applicable (which it is not), conflicts with the Texas Constitution and the Local Government Code, rendering said provision both void and unenforceable.

IV. INSTEAD OF SIMPLY REMANDING THIS CASE TO CONSIDER ISSUES PREVIOUSLY BRIEFED BUT NOT REACHED BELOW, SHOULD THIS COURT, IN THE INTERESTS OF JUSTICE, DETERMINE THAT, BECAUSE PROPOSITIONS 1 AND 2 ARE NOT INCONSISTENT, THE TRIAL COURT CORRECTLY RECONCILED THESE CHARTER AMENDMENTS IN ORDER TO AVOID A DETERMINATION THAT ARTICLE IX, SECTION 19 OF THE HOUSTON CITY CHARTER IS UNCONSTITIONAL.

In his Supplemental Response to the City's Supplemental Plea and Motion for Summary Judgment, see 1 CR 658, 666-675, Hotze argued that Proposition 1 and Proposition 2 are not inconsistent with one other. The Trial Court agreed3 CR 2031. In their Response to Petitioner Hotze's Petition for Review, Respondents contend the Trial Court got this particular finding wrong. Respondents are wrong. The Trial Court correctly determined that Propositions 1 and 2 were not inconsistent with one another.

Respondents incorrectly contend that Proposition 1 trumps Proposition 2 because these two propositions are allegedly "inconsistent" with each other. In support of their flawed argument before the Court of Appeals, Respondents previously relied on a provision contained in Article IX, Section 19 of the Houston City Charter, which declares that only the amendment receiving the greater number of votes shall prevail when two or more "inconsistent" amendments are passed at the same election.

Rejecting this assertion, the Trial Court correctly found that Propositions 1 and 2 are neither irreconcilably nor substantively inconsistent with one another. In so doing, the Trial Court obeyed its duty to abide by well-recognized canons of statutory construction: a court should attempt to avoid questions of constitutionality if there is a reasonable basis to harmonize statutes in a manner so as to avoid striking down a law.

Moreover, where a statute is susceptible of two constructions, one of which causes constitutional questions to arise, and the other of which avoids such questions, the Trial Court's duty was to adopt the latter. State v. Green, 613 S.W.3d 571 (Tex. App.—Texarkana, 2020)(no pet.); see also Tex. Gov't Code § 311.021(1) ("In enacting a statute, it is presumed that . . . compliance with the constitutions of this state and the United States is intended . . . ."); In re Green, 221 S.W.3d 645, 649 (Tex. 2007) (per curiam) ("We must of course avoid a construction of a statute that renders it unconstitutional."); United States v. Albertini, 472 U.S. 675, 680 (1985) ("Statutes should be construed to avoid constitutional questions . . . .").

A. Proposition 1 and Proposition 2 impact different phases of the budgeting process.

The Trial Court correctly held that no factual or legal inconsistency exists between Proposition 1 and Proposition 2. For example, Proposition 1 and Proposition 2 impact different phases of the budgeting process. Proposition 1 solely relates to limitations on the assessment and collection of property tax revenues, while Proposition 2 does not limit any increases in City revenues whatsoever. To the contrary, Proposition 2 relates to the necessity for prior voter approval before total spending in any given budget year may exceed a particular mathematical formula.

Accordingly, this Court should affirm the Trial Court's findings of consistency. Propositions 1 and 2 are not inconsistent, because they address different phases of the city's financial cycle. The city's financial cycle consists of: (1) assessing and collecting taxes and fees; and (2) then spending the monies collected. Accordingly, the Trial Court's finding is supported by the record (1 CR 708-709) as follows:

> (i) Proposition 1 relates to the assessing and collecting phase (1) of the financial cycle. Proposition 2 relates to the spending phase (2) of the financial cycle.
>
> (ii) Proposition 1 stops at the assessing and collecting phase (1), and furnishes no prohibition against the city spending monies collected in excess of the Proposition 1 caps. In other words, voters, taxpayers, and fee payers have no legal remedy available if the city exceeds the Proposition 1 caps and spends such excess, whether that occurs intentionally or unintentionally.
>
> (iii) Unlike Proposition 1, Proposition 2 places no prohibition on the phase (1) assessing and collecting of taxes and fees. However, Proposition 2 does require that total spending of such collected monies, phase (2) of the financial cycle, must be capped at the specified growth rate, unless the city receives voter approval to exceed the spending cap. Otherwise, such excess revenues must be returned to Houstonians and not be spent by the city, with Proposition 2 specified legal remedies if the city fails to comply.
>
> (iv) The Proposition 2 spending cap furnishes voter control over not only operating expenditures but also capital spending, thereby forcing the city to prioritize between and within both operational and capital spending.

> (v) The two propositions address two entirely different subjects and are thus not inconsistent. That is because the two propositions deal with two entirely different subjects. Proposition 1 deals with assessing and collecting taxes and fees, while Proposition 2 deals with spending such collections.

As outlined above, Proposition 1 and Proposition 2 do not address the same functions of the City Council. Proposition 1 only addresses the City Council's ability to assess and collect, making no mention of the City Council's ability to spend. Likewise, Proposition 2 only mentions the City Council's ability to spend, making no mention of the City Council's ability to assess and collect. Accordingly, since the Propositions address entirely different functions of the City Council, without any overlap, they cannot be inconsistent. Therefore, Propositions 1 and 2 are not inconsistent as a matter of law.

B. The term "Inconsistent" is not defined in Article IX, Section 19 of the City Charter.

The term "inconsistent" is not defined in Article IX, Section 19 of the City Charter. Thus, according to well-established rules of statutory construction, the Court must look to the common usage of the word when determining its meaning. *See* TEX. GOV'T CODE § 311.011(a) ("[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage"). Both Ballentine's Law Dictionary and

Webster's Dictionary provide a common definition for the term "inconsistent." *Berry, et al. v. City of Fort Worth, et al.,* 110 S.W.2d 95, 103 (Tex. Civ. App.—Fort Worth 1937, writ granted) (court looked to Black's Law Dictionary and Webster's Dictionary for definition of "inconsistent"). Ballentine's Law Dictionary defines inconsistent as "[r]epugnant; not in harmony or accord. Contradictory of one another." BALLENTINE'S LAW DICTIONARY (3rd ed. 1969). Webster's Dictionary defines inconsistent as "a. not compatible with another fact or claim <*inconsistent* statements>; b. containing incompatible elements <an *inconsistent* argument>; c. incoherent or illogical in thought or actions. MERRIAM-WEBSTER ONLINE (2021). Proposition 1 and Proposition 2 are not inconsistent under any of the aforementioned definitions. In light of these definitions, the Trial Court properly found that Proposition 1 and Proposition 2 are not inconsistent.

C. <u>The text of Proposition 1 and Proposition 2 demonstrate that they are not inconsistent.</u>

As demonstrated by the record (1 CR 700-705), the text of each proposition makes clear that they are not inconsistent. Proposition 1 is a limit imposed on specific sources of revenue, and this is made explicit in the proposed amendment as follows:

> "Article III"
>
> "Section 1 . Taxation.

In each tax year beginning in tax year 2005:

(a) The City Council shall not, without voter approval, levy **ad valorem taxes** at combined rates expected to result in **total ad valorem tax revenues** for the then current fiscal year that exceed the lower of…."

"Article IX"

"Section 20. Limits on Water and Sewer Rates.

Beginning July 1, 2005, the average annual **rates for water and sewer services** over the period beginning January 1, 2005, shall not be increased, without voter approval, in any fiscal year by an amount greater than the combined rates of inflation and population growth in the city…"

"Article III"

"Section 1. Taxation.

In each tax year beginning in tax year 2005:
(b)…. "**The City Council shall have full authority to assess and collect any and all revenues of the city without limitation, except as to ad valorem taxes and water and sewer rates."**

As a result of the above-quoted excerpts, this Court should find the following to be true:

(i) The inclusion of this provision makes it clear that Proposition 1 is designed to limit ad valorem taxes and water and sewer rates, but not other sources of revenue.

(ii) Under this limit, the specific sources of revenue would be constrained, but not other sources of revenue or total revenue.

> (iii) The fact that there is no provision for disposition of revenue above the limit is further evidence that Proposition 1 is not designed to constrain the total revenue of the City of Houston.

In contrast to the text of Proposition 1, Proposition 2 imposes a limit on the total revenue that the City of Houston can retain and spend. The pertinent sections of Proposition are as follows:

> "The City Charter of the City of Houston shall be amended by adding a new Section 7 to Article VI-a to read as follows:
>
> "Section 7. Limits on All City Revenues.
>
> SUBSECTION ONE-LIMITATION ON GROWTH IN REVENUES. City Council shall not, without the prior approval of 60% of those voting at a regular election, increase the City's "**Combined Revenues**" (see SUBSECTION SIX for definition)…"
>
> SUBSECTION SIX-DEFINITIONS. Within this Charter Amendment:
>
> 1. a. "REVENUES" means that term as used for cities by the Governmental Accounting Standards Board and the Government Finance Officers Association, and is to include both operating and non-operating revenues.
>
> 2. b. **"COMBINED REVENUES" means the combined revenues of the City's General Fund, Enterprise Funds and Special Revenue Funds.** However, "COMBINED REVENUES" shall exclude: (1) grant monies and other revenues received from other governmental entities; and (2) IntraCity (in other words, InterFund) revenues…"

The fact that Proposition 2 is designed to constrain total revenues is

made explicit in the provision for the disposition of surplus revenue:

> "SUBSECTION TWO-CERTIFICATION OF CITY COMPLIANCE. Before each year's City budget can be officially authorized by City Council, the City Controller must furnish written verification that the budget complies with the requirements of SUBSECTION ONE of this Charter amendment. Further, within four months after the end of each fiscal year, the City's independent accountants (firm that performs the City's regular financial audit) shall furnish a written verification that the City complied during such complete fiscal year with SUBSECTION ONE of this Charter amendment, or specify the amount of noncompliance. **If the City exceeds the Combined Revenues allowable under SUBSECTION ONE, then, within 30 days after receiving notification from the City's independent accountants, the City shall transfer such excess amount to an interest-bearing Taxpayers Relief Fund. Monies in the Taxpayers Relief Fund cannot be used for City expenditures…."**

Based on these provisions, this Court should find the following to be true:

> (i) While Proposition 1 and Proposition 2 would have different impacts on the fiscal policy of the City of Houston, both can be implemented to achieve different objectives.
>
> (ii) Because Proposition 1 is a limitation on specific sources of revenue, the major impact will be on the composition of revenue. Some sources of revenue would be constrained while other sources of revenue could continue to grow in excess of the limit. If the City of Houston chooses to maintain the growth of total revenues, one would expect other sources of revenue to grow more rapidly than would have occurred in the absence of the limit.
>
> (iii) Proposition 2, on the other hand, is designed to constrain the total revenue of the City of Houston.

> Proposition 2 defines a broad base of revenue against which the limit applies, with few exceptions.
>
> (iv) There is no reason to expect that specific sources of revenue, such as ad valorem taxes or sewer and water rates, would be subject to any greater constraint than other sources of revenue.

As a result of the above-quoted excerpts, this Court should declare the following:

> 1. Because Proposition 1 and Proposition 2 are designed to have different impacts on the fiscal policies of the City of Houston, it is not inconsistent to have both of these propositions on the ballot.
>
> 2. Nor is it inconsistent to have both of these proposed amendments to be enacted, limiting the power of the City of Houston to tax and spend.
>
> 3. If both of these amendments are enacted, it is possible that either or both of them would be triggered at any point in time. One can envision several scenarios in which this would occur.
>
> **Scenario One: Recession**
> If the City of Houston experiences a recession in which there is a revenue shortfall, neither of the limitations could be triggered.
>
> **Scenario Two: A Real Estate Boom**
> In a real estate boom we would expect property tax revenues to increase rapidly, triggering the limitation on ad valorem taxes imposed by Proposition 1. Other sources of revenue may or may not increase rapidly, and total revenue growth may or may not exceed the limits imposed by Proposition 2.
>
> **Scenario Three: A Windfall Gain**

> A windfall gain might result in a sharp increase in other sources of revenue. Such a windfall could boost total revenue growth and trigger the limits imposed by Proposition 2. Such windfalls might be from sources of revenue other than ad valorem taxes, and the limits on this source of revenue imposed by Proposition 1 may or may not be triggered.

Based on the foregoing, it appears that the Houston City Council put Proposition 1 on the ballot in an effort to preempt the more stringent limit imposed in Proposition 2. However, a majority of voters in Houston voted to enact both of these provisions. From the perspective of citizens and voters, it is fair to say that the majority of voters expected both of these provisions to be enacted and enforced simultaneously. And, as shown above, the Trial Court properly harmonized these provisions in a manner so as to avoid finding a conflict and potentially triggering a duty to hold Article IX, Section 19 of the Houston City Charter unconstitutional. Simply put, the voter's expectation is that specific revenues identified in Proposition 1 will be constrained; and also that total revenue identified in Proposition 2 will also be constrained. It is not inconsistent to have both of these provisions enacted simultaneously, indeed that is the only way to interpret the outcome of this election.

Accordingly, Proposition 1 and Proposition 2 are consistent and enforceable. As outlined above, in any given year, either or both of these

limits could impose a binding constraint on the power of the City of Houston to tax and spend. In light of this analysis, Proposition 1 and Proposition 2 can peacefully coexist, and depending on the fiscal and economic circumstances, one or both can come into play.

V. IN THE ALTERNATIVE TO THE ISSUE PRESENTED IN IV ABOVE, SHOULD THIS COURT FIND THAT ARTICLE IX, SECTION 19 OF THE HOUSTON CITY CHARTER DOES APPLY, THEN THIS COURT SHOULD DECLARE THAT THIS CHARTER PROVISION CONFLICTS WITH BOTH THE TEXAS CONSTITUTION AND STATE LAW AND IS THEREFORE VOID AND UNENFORCEABLE AS APPLIED.

Assuming that Proposition 1 and Proposition 2 are inconsistent with one another (which it is not, as detailed above), then the consideration of whether Article IX, Section 19 of the City Charter is unconstitutional under Tex. Const. art. XI § 5 (2004) or 9.005(a) of the Local Government Code is unavoidable. According to Article IX, Section 19 of the City Charter:

> Any amendment to the Charter of the City of Houston which may be adopted which is inconsistent with any existing provision of the City Charter shall by such adoption repeal such inconsistent provision, and at any election for the adoption of amendments if the provisions of two or more proposed amendments approved at said election are inconsistent the amendment receiving the highest number of votes shall prevail.

Charter of the City of Houston, Article IX, Section 19. According to the Texas Constitution, "…no charter or any ordinance passed under said

chapter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State." Tex. Const. art. XI § 5 ; *see also Berry v. City of Fort Worth*, 124 S.W.2d 842, 845-846 (Tex. 1939) (finding that it was error for lower court to hold that ordinance in question regarding police power of the City of Fort Worth was not in violation of Constitution and was valid). This section of the Texas Constitution makes clear that the Texas Constitution and the laws passed by the Legislature supersede and prevail over inconsistent provisions contained in city charters. Thus, a city charter amendment cannot survive if it conflicts with a state statute (i.e., a Local Government Code provision) or a constitutional provision.

In addition, state law requires that "[a] proposed charter for a municipality or a proposed amendment to a municipality's charter ***is adopted if it is approved by a majority of the qualified voters*** of the municipality who vote at an election held for that purpose." TEX. LOCAL GOV'T CODE § 9.005(a)(emphasis added). Propositions 1 and 2 were both adopted by a majority of the voters of the City of Houston on November 2, 2004. Thus, under Section 9.005(a), both Propositions must be enacted. However, should Article IX, Section 19 of the City Charter ply, then Proposition 2 will not be effective, in total derogation of Section 9.005(a). Thus, this provision, if

applicable (which it is not), conflicts with the Texas Constitution and the Local Government Code, rendering said provision both voidable and unenforceable.

In accordance with their argument regarding Article IX, Section 19 of the City Charter, Respondents contended in previous briefing before the Trial Court that the legislature would have to explicitly limit the City's ability to add a provision to its Charter prescribing a remedy for inconsistent charter amendments, and as such, the legislature has not done so. *See* Defendants' Motion for Summary Judgment at p. 14. The cases that they cite are distinguishable from the case at bar. In *Quick v. City of Austin*, the City Charter set out the date as to when ordinances become effective. The Court found that the City did have the ability to prescribe when ordinances become effective because the Legislature had not limited the City's authority to control the effective date of its ordinances. Respondents used this case for the proposition that the City of Houston has the ability to prescribe a remedy for inconsistent charter amendments. This situation is entirely different. In *Quick*, the City ordinance did not violate state law, whereas Article IX, Section 19 and the poison-pill provision do violate state law, as outlined above.

In addition, Respondents' previous briefing relies on cases such as *City of Richardson, Texas v. Responsible Dog Owners of Texas, et al.*, arguing that a general law and a city ordinance will not be held repugnant to each other if any other reasonable construction leaving both in effect can be reached." *See City of Richardson, Texas v. Responsible Dog Owners of Texas, et al.,* 794 S.W.2d 17 (Tex. 1990). While this general proposition is true, it has no relevance to this case. Here, a city ordinance is in contradiction with provisions of the Local Gov't Code, and neither the *City of Richardson* case, nor any other Texas case stands for that proposition. Therefore, Article IX, Section 19 and the poison-pill provision are void and unenforceable.

Finally, Respondents have previously argued that Article IX, Section 19 of the City Charter eradicates Proposition 2 because Proposition 2 allegedly encroaches on the Houston City Council's "full authority to assess and collect any and all revenues of the city without limitation …." This is not correct. Indeed, Petitioner Hotze has already demonstrated that nothing in Proposition 2 affects the assessment or collection of any revenues. To the contrary, Proposition 2 merely relates to expenditures. Proposition 1 states "[t]he City Council shall have full authority to assess and collect any and all revenues of the city without limitation, except as to ad valorem taxes and

sewer rates," while Proposition 2 states "City Council shall not, …, increase the City's 'Combined Revenues'…for any fiscal year in an amount greater that …." Accordingly, Petitioner Hotze asserts that this Court has a duty to interpret both Proposition 1 and Proposition 2 in a manner which finds them to be consistent. TEX. GOV'T CODE § 311.025(b); TEX. GOV'T CODE § 312.014(b); *see also Young v. State*, 14 S.W.3d 748, 752 (Tex. Crim. App. 2000) (stating that if amendments to the same statute are enacted at the same session of the legislature…the amendments shall be harmonized, if possible, so that effect may be given to each); *La Sara Grain Co. v. First National Bank of Mercedes*, 673 S.W.2d 558, 565 (Tex. 1984) (stating that "[g]enerally, courts are to construe statutes so as to harmonize with other relevant laws, if possible). Should the Court find an irreconcilable conflict between Proposition 1 and Proposition 2 (which there is not), then Petitioner Hotze asserts that Article IX, Section 19 of the City Charter is in direct conflict with the above-quoted sections of the Texas Constitution and the Local Government Code. Article IX, Section 19 allows the City of Houston to throw out an amendment, even if it has been approved by a majority of the voters. This is inconsistent with the Local Governments Code's requirement that an amendment voted in by a majority of the voters is approved and shall be entered into the municipality's records as such.

Interestingly, a search of the City Charters of Austin, Dallas, Fort Worth and San Antonio, has shown that none of these cities have any kind of inconsistency provision akin to Article IX, Section 19 or the poison-pill of Proposition 1:

(i) http://www.ci.austin.tx.us/law/(visited February 11, 2021);

(ii) http://www.dallascityhall.com/dallas/eng/pdf/cao/99Chartr.pdf#search='City%20Charter%20Dallas'(visited February 11, 2021);

(iii) http://www.fortworthgov.org/csec/disclaimer.asp(visited February 11, 2021); and

(iv) http://www.sanantonio.gov/codesrch.asp (visited February 11, 2021).

Petitioner Hotze requests the Court to take judicial notice of these facts.

VI. THE RESPONDENTS ARE WRONG IN THEIR ASSERTION THAT NO PLEADING SUPPORTS THE DECLARATORY RELIEF GRANTED BY THE TRIAL COURT AND ADDITIONAL RELIEF IS WARRANTED.

Finally, the Respondents' assertion that no pleadings support the Trial Court's findings are simply wrong. In particular, Paragraphs 13 and 17 of the Plaintiffs' Second Amended Original Petition sought declaratory relief that Propositions 1 and 2 are not inconsistent and Paragraph 14 sought declaratory relief that Article IX, Section 19 of the Houston City Charter was never triggered. 1 CR 40, 50-51, 53. Furthermore, not only did

Plaintiffs' prayer for relief requested multiple and specific items of declaratory relief, but it also contained a general prayer for "All other and further declaratory and injunctive relief to which Plaintiffs may show themselves to be justly entitled." 1 CR 56.

No special exceptions were lodged by the Respondents. The proper response to a legally or factually infirm pleading is to file special exceptions objecting to the pleading. *Tex. R. Civ. P. 91*; see *Parker v. Barefield*, 206 S.W.3d 119, 120 (Tex. 2006) (per curiam) ("Special exceptions are appropriate to challenge a plaintiff's failure to state a cause of action."); Friesenhahn v. Ryan, 960 S.W.2d 656, 658 (Tex. 1998) ("Special exceptions may be used to challenge the sufficiency of a pleading."). Special exceptions notify the parties and the court that legal or factual uncertainty exists as to the claimed cause of action or affirmative defense. The purpose of the fair-notice requirement is to provide the opposing party with sufficient information to enable it to prepare a defense. *Roark v. Allen*, 633 S.W.2d 804, 810 (Tex. 1982). Therefore, to object to the sufficiency of Hotze's Second Amended Original Petition, Respondents were required to file a special exception that "point[ed] out intelligibly and with particularity the defect, omission, obscurity, duplicity, generality, or other insufficiency of the allegations in the pleading excepted to." *Tex. R. Civ. P. 91*. Respondents

failed to do so. In the absence of special exceptions challenging the sufficiency of the pleadings, the Trial Court was correct to construe Hotze's live petition liberally in favor of the pleader. *Roark v. Allen*, 633 S.W.2d 804, 809 (Tex. 1982).

Moreover, the scope of Respondents' attack on Hotze's trial pleadings has been exaggerated. In their briefing before the Court of Appeals, see Cross-Appellants' Brief, filed on December 21, 2020, the false assertion is made that they objected to a lack of pleading "in Hotze's last live petition or its prayer for relief." See Cross-Appellants' Brief on page 21-22. In supposed "support" for that statement, Respondents (Cross-Appellants) dropped a footnote (footnote 22), and cite 2 CR 1561-1562 of the record. This footnote citation is curious, because it belies what is contended. Far from evidencing an objection to the lack of pleading for specific declaratory relief, it instead shows a *concession* that Hotze plead for declaratory relief that Proposition 1 and Proposition 2 were not inconsistent, and that alternatively, both Proposition 1 (if the poison-pill provision exists) and Article IX, Section 19 were unconstitutional. Moreover, footnote 22 shows that the Respondents/Cross-Appellants' trial objection was solely lodged to Hotze's prayer for relief. Not only was this objection not in the form of a special exception, but no ruling was ever pursued, much less obtained, by

them. Accordingly, Respondents'/Cross-Appellants' "lack of pleading" argument is specious and should be flatly rejected by this Court.

As demonstrated herein, both the Court of Appeals and the Trial Court erred by not granting Petitioner's Traditional Motion for Summary Judgment. Appellate review of a summary judgment is de novo. Where both sides file motions for summary judgment and the trial court grants one and denies the other, the appellate court reviews the evidence submitted by both parties, determines all questions presented, and renders the judgment that the trial court should have rendered. *Dow Chem. Co. v. Bright*, 89 S.W.3d 602, 605 (Tex. 2002); *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000). Accordingly, this Court may render the judgment on what the Trial Court should have rendered, e.g., a declaration that: (i) Proposition 2 is valid and enforceable; (ii) the poison pill provision was never included within the text of Proposition 1; (iii) the poison pill provision was never submitted nor passed by a majority of the Houston electorate; (iv) therefore the poison pill provision is not a part of Proposition 1; (v) the City's budget ordinances for FY 2011 thru FY 2019 exceed the cap of Proposition 2; and (vi) to the extent not yet spent, then all said amounts must be placed in a segregated taxpayer account pending an election, or, alternatively, returned to the taxpayers.

VII. BECAUSE PETITIONER'S TRADITIONAL MOTION FOR SUMMARY JUDGMENT SEEKING TO VALIDATE AND ENFORCE PROPOSITION 2 SHOULD HAVE BEEN GRANTED, BOTH THE COURT OF APPEALS AND THE TRIAL COURT JUDGMENT SHOULD BE REVERSED AND RENDERED IN PETITIONER'S FAVOR, AND THE CAUSE SHOULD BE REMANDED TO CONSIDER AN AWARD OF ATTORNEYS' FEES TO PETITIONER.

Accordingly, for all of the reasons asserted above, the Trial Court should have granted Petitioner's Traditional Motion for Summary Judgment with respect to the relief sought to validate and enforce Proposition 2. As the prevailing party under Chapter 37.009 of the Texas Civil Practices and Remedies Code, upon this Court's remand to the Trial Court for further proceedings, Petitioner Hotze seeks recovery of his reasonable and necessary attorneys' fees against the Defendant, City of Houston.

PRAYER

Petitioner asks this Court to grant this Petition for Review and to reverse and render judgment on his Traditional Motion for Summary Judgment, and to remand the case for attorneys' fees.

Respectfully Submitted,

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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

By affixing my signature above, I hereby certify that a true and correct copy of Bruce Hotze's Petition for Review has been delivered via the electronic filing system to the parties below on the 5th day of July, 2022.

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/s/ Andy Taylor
Andy Taylor

CERTIFICATE OF COMPLIANCE

In accordance with TEX. R. APP. P. 9.4(i)(3), I certify that this Brief complies with the type-volume restrictions of TEX. R. APP. P. 9.4(e), (i)(2)(B). Exclusive of the portions exempted by Rule 9.4(i)(1), this Brief contains 12,240 words and is in Times New Roman, 14-point type.

/s/ Andy Taylor
Andy Taylor

No. 21-1037

IN THE SUPREME COURT OF TEXAS
IN AUSTIN

BRUCE R. HOTZE
Petitioner,

v.

SYLVESTER TURNER, MAYOR, AND THE CITY OF HOUSTON,
Respondents.

On Appeal from the 14th Court of Appeals, Harris County
No. 14-19-00959-CV
333rd Judicial District Court
Harris County, Texas No. 2014-19507
Honorable Randy Daryl L. Moore, Judge Presiding

APPENDIX

Document **Tab**

No. 21-1037

IN THE SUPREME COURT OF TEXAS
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APPENDIX, TAB A

October 12, 2021

JUDGMENT

The Fourteenth Court of Appeals

BRUCE R. HOTZE, Appellant

NO. 14-19-00959-CV V.

SYLVESTER TURNER, MAYOR, AND THE CITY OF HOUSTON, Appellees

This cause, an appeal from the judgment in favor of appellees, Sylvester Turner, Mayor, and The City of Houston, signed September 16, 2019, was heard on the appellate record. We have inspected the record and find no error in the judgment. We order the judgment of the court below **AFFIRMED**.

We order appellant, Bruce R. Hotze, to pay all costs incurred in this appeal.

We further order this decision certified below for observance.

Judgment Rendered October 12, 2021.

Panel Consists of Justices Jewell, Zimmerer, and Hassan. Majority Opinion delivered by Justice Hassan and Dissenting Opinion delivered by Justice Jewell.

No. 21-1037

IN THE SUPREME COURT OF TEXAS
IN AUSTIN

BRUCE R. HOTZE
Petitioner,

v.

SYLVESTER TURNER, MAYOR, AND THE CITY OF HOUSTON,
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333rd Judicial District Court
Harris County, Texas No. 2014-19507
Honorable Randy Daryl L. Moore, Judge Presiding

APPENDIX, TAB B

Affirmed and Majority and Dissenting Opinions filed October 12, 2021.

In The

Fourteenth Court of Appeals

NO. 14-19-00959-CV

BRUCE R. HOTZE, Appellant

V.

SYLVESTER TURNER, MAYOR, AND THE CITY OF HOUSTON, Appellees

On Appeal from the 333rd District Court
Harris County, Texas
Trial Court Cause No. 2014-19507

M A J O R I T Y O P I N I O N

This dispute stems from two amendments to the Houston City Charter, both of which prescribed certain limitations on the City's revenue collection. In 2014, Appellant Bruce R. Hotze sued Sylvester Turner in his official capacity as Mayor of the City of Houston and the City of Houston (together, "Appellees") to enforce one of those amendments.

The parties filed cross-motions for summary judgment; the trial court

granted in part and denied in part Appellees' summary judgment motion and denied Hotze's motion. The case proceeded to a bench trial and the trial court signed a judgment for Appellees. Hotze appealed and challenges the trial court's summary judgment order. Appellees filed a cross-appeal contingent on this court sustaining any of the issues raised in Hotze's appeal. For the reasons below, we affirm the trial court's summary judgment.

BACKGROUND

Propositions 1 and 2

In 2004, two potential amendments to the Houston City Charter were proposed to limit increases in sources of City revenue: Propositions 1 and 2. The text of both Propositions was included in full in "City of Houston Ordinance No. 2004-887" (the "Election Ordinance"). The Election Ordinance ordered a special election to be held on November 2, 2004, to submit Propositions 1 and 2 to a vote.

Proposition 1 was placed on the ballot pursuant to the City's own motion. Addressing "Limits on Annual Increases in City Property Taxes and Utility Rates", Proposition 1 imposed a limit on property taxes and water and sewer rates by requiring that the Houston City Council obtain voter approval before increasing (1) property tax revenues above a limit measured by the lesser of 4.5% or the cumulative combined rates of inflation and population growth, or (2) water and sewer rates above the cumulative combined rates of inflation and population growth. Aside from these restrictions, Proposition 1 permitted the City to retain "full authority to assess and collect any and all revenues of the city without limitation."

Following the quoted text of Proposition 1, the Election Ordinance included a primacy clause stating:

> If another proposition for a Charter amendment relating to limitations on increases in City revenues is approved at the same election at which this proposition is also approved, and if this proposition receives the higher number of favorable votes, then this proposition shall prevail and the other shall not become effective.

In contrast to Proposition 1, Proposition 2 resulted from a citizen-initiated referendum petition. Addressing "Limits on all Combined City Revenues", Proposition 2 required the City to obtain voter approval before it could increase total revenues from all sources by more than the combined rates of inflation and population.

In the November 2004 election, Propositions 1 and 2 each passed with a majority of the votes cast on the particular proposition. Proposition 1 received more favorable votes than Proposition 2.

The results of the election were declared in "City of Houston Ordinance No. 2005-568 (the "Adoption Ordinance"). The Adoption Ordinance stated that Propositions 1 and 2 "were approved by a majority of the qualified voters voting in the Election and are adopted, with Proposition 1 receiving a higher number of votes than Proposition 2." The Adoption Ordinance further stated that Proposition 1 was legally binding and that Proposition 2 would not be enforced. This conclusion rested on two bases: (1) Proposition 1's primacy clause, and (2) article IX, section 19 of the Houston City Charter which states, in relevant part:

> at any election for the adoption of amendments if the provisions of two or more proposed amendments approved at said election are inconsistent the amendment receiving the highest number of votes shall prevail.

The Underlying Proceeding

In April 2014, Hotze filed an original petition asserting claims against

Appellees.[1] In Hotze's second amended petition, he requested the following declaratory judgments regarding the interplay between Propositions 1 and 2:

- Both Propositions 1 and 2 are valid as a matter of law.
- Proposition 1's primacy clause "was never included in the actual text of Proposition 1 and was never voted on or passed by the electorate."
- Alternatively, if the trial court concludes that the primacy clause is a valid part of Proposition 1, then "Proposition 1 is unconstitutional because it violates Tex. Const. art. XI § 5 and is illegal because it violates Section 9.005(a) of the Local Government Code."
- Propositions 1 and 2 are not inconsistent.
- Alternatively, if the trial court concludes Propositions 1 and 2 are inconsistent, that either Proposition 1 or article IX, section 19 of the Houston City Charter is unconstitutional.
- Alternatively, if the trial court concludes that neither Proposition 1 nor article IX, section 19 of the Houston City Charter is unconstitutional, the trial court "should reconcile the Propositions so that at the very least, the portions of both Propositions that the Court finds are not inconsistent can stand."

Hotze's second amended petition also alleged that Appellees have "passed annual budgets . . . which exceed the permissible caps contained in either Proposition 1 or Proposition 2 or both." Hotze requested declaratory and injunctive relief with respect to these alleged budgetary violations.

Appellees filed a combined plea to the jurisdiction and a motion for summary judgment, which the trial court denied. Appellees filed an interlocutory appeal from the denial of their plea to the jurisdiction. *See Turner v. Robinson*, 534 S.W.3d 115, 118 (Tex. App.—Houston [14th Dist.] 2017, pet. denied).[2] In

[1] Hotze was one of three plaintiffs that filed the original petition. The other two plaintiffs are not parties to this appeal.

[2] In *Turner*, this court also provided a detailed overview of other litigation relating to Propositions 1 and 2. *See Turner*, 534 S.W.3d at 120-22.

that appeal, we concluded that (1) Hotze, as a taxpayer, had standing to seek injunctive and declaratory relief, (2) Hotze pleaded a valid *ultra vires* claim against the Mayor, and (3) the City's sovereign immunity with respect to Hotze's declaratory judgment action was waived under the Uniform Declaratory Judgment Act. *See id*. at 124, 126, 127. We affirmed the trial court's denial of Appellees' plea to the jurisdiction. *Id*. at 127.

Back in the trial court, Appellees filed a "Supplemental Plea to the Jurisdiction/Motion for Summary Judgment and Motion for Reconsideration of this Court's May 2, 2016 Order Denying Defendants' Plea to the Jurisdiction and Motion for Summary Judgment." Hotze filed a traditional motion for summary judgment. *See* Tex. R. Civ. P. 166a(c).

On September 16, 2019, the trial court signed an order that (1) granted in part and denied in part the City's "Supplemental Plea to the Jurisdiction/Motion for Summary Judgment and Motion for Reconsideration", and (2) denied Hotze's traditional motion for summary judgment. The trial court's order also contains the following conclusions of law:

1. [Hotze] has taxpayer standing;
2. [Hotze] does not have standing under Proposition 2;
3. Governmental immunity does not bar [Hotze's] suit;
4. Proposition 2 is not effective because of Proposition 1's primacy clause; and
5. Propositions 1 and 2 are not irreconcilably or substantively inconsistent and do not trigger Art. IX, § 19 of the City Charter.

The parties proceeded to a bench trial in October 2019; the only issue remaining for the trial court's determination was whether Appellees had complied with Proposition 1. The trial court signed a final judgment on October 29, 2019, concluding that (1) Appellees fully complied with Proposition 1 throughout the

relevant time period, and (2) Hotze was not entitled to an award of attorney's fees. Hotze appealed and Appellees filed a cross-appeal.

ANALYSIS

Asserting error in the trial court's September 16, 2019 summary judgment order, Hotze raises three issues challenging the trial court's conclusion that "Proposition 2 is not effective because of Proposition 1's primacy clause[.]" Specifically, Hotze asserts:

1. The primacy clause "was never included in Proposition 1."
2. Proposition 2 does not trigger Proposition 1's primacy clause.
3. Proposition 1's primacy clause conflicts with the Texas Constitution and state law.

Hotze also requests that we remand the case to permit the trial court to determine whether he is entitled to a recovery of attorney's fees.

In their cross-appeal, Appellees assert that the issues they raise merit consideration only if this court reverses the trial court's conclusion that Proposition 1's primacy clause renders Proposition 2 unenforceable.

For the reasons below, we overrule the issues Hotze raises on appeal. Because we do not revisit the trial court's conclusion of law regarding Proposition 1's primacy clause, we need not address the issues Appellees raise in their cross-appeal.

I. Standard of Review

The parties' cross-motions for summary judgment presented a question of law regarding the effect of Proposition 1's primacy clause on Proposition 2. We review the trial court's conclusion of law on this point *de novo*. *Cook v. Nissimov*, 580 S.W.3d 745, 751 (Tex. App.—Houston [14th Dist.] 2019, pet. denied).

"When we review cross-motions for summary judgment, we consider both motions and render the judgment that the trial court should have rendered." *Coastal Liquids Transp., L.P. v. Harris Cty. Appraisal Dist.*, 46 S.W.3d 880, 884 (Tex. 2001). Each party bears the burden of establishing that it is entitled to judgment as a matter of law. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 356 (Tex. 2000).

II. Application

A. The Primacy Clause Was Included in Proposition 1.

Referring to the Election Ordinance, Hotze points out that the primacy clause was "not combined within the quoted portion" of Proposition 1 but instead was listed afterwards in a separate paragraph. This structure, Hotze argues, "means that the [primacy clause] was not intended and indeed was not part of the text of Proposition 1."

Hotze does not cite, and our research did not find, any case law or other authority to support his contention that quoted versus unquoted portions of a proposition as shown in the Election Ordinance determine those provisions' enforceability. Without any authority to support this construction, we will not adopt it here.

Moreover, the ultimate determination regarding Propositions 1 and 2 was reserved to the voters. *See* Tex. Const. art. XI, § 5 ("Cities having more than five thousand (5000) inhabitants may, by a majority vote of the qualified voters of said city, at an election held for that purpose, adopt or amend their charters."). When they cast their votes, "voters are presumed to be familiar with every measure on the ballot." *Dacus v. Parker*, 466 S.W.3d 820, 825 (Tex. 2015); *see also Dacus v. Parker*, 383 S.W.3d 557, 565 (Tex. App.—Houston [14th Dist.] 2012), *rev'd on other grounds*, 466 S.W.3d 820 (Tex. 2015) ("We instead presume that by the time

voters have entered the polling place, they already are familiar with the measure [on the ballot].”). This presumption is justified “because publication of the measures as required by law constitutes notice to the voters of its contents.” *Dacus*, 383 S.W.3d at 565.

Included in their response to Hotze’s summary judgment motion, Appellees filed an exhibit containing four Houston Chronicle newspaper articles published in the three months preceding the November 2004 election on Propositions 1 and 2.[3] These articles consistently described Propositions 1 and 2 as “competing charter amendments”. The August 26, 2004 article specifically stated that the Proposition “with the most votes will become law because they propose conflicting policies.”[4] The October 30, 2004 article informed readers that “Houston residents will vote Tuesday on the two competing charter amendments that would limit city revenues by different means.”[5]

As this evidence shows, newspaper articles published before the election stated that Propositions 1 and 2 were alternative proposals to limit city revenues.

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[3] *See* Ron Nissimov, *Survey Weighs Propositions; Both Limit Revenues*, Houston Chronicle, Oct. 30, 2004, https://www.chron.com/news/politics/article/Survey-weighs-propositions-both-limit-revenues-1516633.php; *Revenue Caps: Vote FOR Prop. No. 1, AGAINST Prop. No. 2*, Houston Chronicle, Oct. 6, 2004, https://www.chron.com/opinion/editorials/article/Revenue-caps-Vote-FOR-Prop-No-1-AGAINST-Prop-1961490.php; Ron Nissimov, *City’s Revenue Fight Going to the Nov. 2 Ballot*, Houston Chronicle, Aug. 26, 2004, https://www.chron.com/news/politics/article/City-s-revenue-fight-going-to-the-Nov-2-ballot-1969054.php; Kristen Mack & Ron Nissimov, *Debate on City Revenue Caps Kicks Off*, Houston Chronicle, Aug. 24, 2004, https://www.chron.com/news/houston-texas/article/Debate-on-city-revenue-caps-kicks-off-1493833.php.

[4] Ron Nissimov, *City’s Revenue Fight Going to the Nov. 2 Ballot*, Houston Chronicle, Aug. 26, 2004, https://www.chron.com/news/politics/article/City-s-revenue-fight-going-to-the-Nov-2-ballot-1969054.php.

[5] Ron Nissimov, *Survey Weighs Propositions; Both Limit Revenues*, Houston Chronicle, Oct. 30, 2004, https://www.chron.com/news/politics/article/Survey-weighs-propositions-both-limit-revenues-1516633.php

This representation aligns with the primacy clause which states that, if two propositions "relating to limitations on increases in City revenues" were approved at the same election, Proposition 1 alone would prevail if it received more votes than the competing proposition. We presume the voters were familiar with this procedural posture when they voted on Propositions 1 and 2 and cast their votes accordingly. *See Dacus*, 466 S.W.3d at 825. We will not forgo this presumption and its application to the issue here merely because the primacy clause was not included within the quoted portion of Proposition 1 in the Election Ordinance.

We overrule Hotze's first issue.

B. Proposition 2 Triggers Proposition 1's Primacy Clause.

In his second issue, Hotze asserts that Proposition 2 does not trigger Proposition 1's primacy clause because "Proposition 1 and Proposition 2 impact different phases of the budgeting process." Specifically, Hotze contends that Proposition 1 "solely relates to limitations on the assessment and collection of property tax revenues" whereas Proposition 2 "relates to the necessity for prior voter approval before total spending in any given budget year may exceed a particular mathematical formula." We reject this contention.

The rules governing the construction of state statutes also govern our construction of municipal ordinances. *See City of Pearland v. Reliant Energy Entex*, 62 S.W.3d 253, 256 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). The proper construction of an ordinance is a question of law we review *de novo*. *Id*.

In construing a municipal ordinance, we seek to determine and give effect to the intent of the governing body of the municipality. *MHI P'ship, Ltd. v. City of League City*, 525 S.W.3d 370, 378 (Tex. App.—Houston [14th Dist.] 2017, no pet.). We ascertain that intent from the language the governing body used in the

ordinance — if the meaning of the ordinance's language is unambiguous, we adopt the interpretation supported by the plain meaning of the provision's words. *Id*. "We must not engage in forced or strained construction; instead, we must yield to the plain sense of the words the governing body chose." *Id*. at 378-79.

Here, a plain reading of Propositions 1 and 2 shows that Proposition 2 falls within the primacy clause's ambit. The primacy clause states:

> If another proposition for a Charter amendment ***relating to limitations on increases in City revenues*** is approved at the same election at which this proposition is also approved, and if this proposition receives the higher number of favorable votes, then this proposition shall prevail and the other shall not become effective.

(emphasis added). As shown in the Election Ordinance, the text of Proposition 2 advances an amendment "relating to limitations on increases in City revenues":

- Proposition 2 is described as an amendment "Relating to Limits on All Combined City Revenues."
- Subsection 1 of Proposition 2 is entitled "Limitation on Growth in Revenues."
- Pursuant to Subsection 1, the Houston City Council may not, without the prior approval of 60% of those voting at a regular election, increase the City's "combined revenues" in an amount greater than the combined rates of inflation and population. Proposition 2 defines "combined revenues" as "the combined revenues of the City's General Fund, Enterprise Funds and Special Revenue Funds" and excludes "grant monies and other revenues received from other governmental entities" and "IntraCity (in other words, InterFund) revenues."

As these excerpts show, Proposition 2 advances an amendment that limits increases in City revenue past certain thresholds. Therefore, it falls within the primacy clause's purview.

We overrule Hotze's second issue.

C. Proposition 1's Primacy Clause Does Not Conflict With the Texas Constitution and State Law.

In his third issue, Hotze asserts Proposition 1's primacy clause "conflicts with the Texas Constitution and state law and is therefore void and unenforceable." Hotze bases this argument on article XI, section 5 of the Texas Constitution and Texas Local Government Code sections 9.004(e) and 9.005(a).

Article XI, section 5 of the Texas Constitution provides as follows with respect to the amendment of city charters for cities of 5,000 or more population:

> The adoption or amendment of charters is subject to such limitations as may be prescribed by the Legislature, and no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State or ***of the general laws enacted by the Legislature of this State.***

Tex. Const. art XI, § 5 (emphasis added). Hotze contends the primacy clause runs afoul of this constitutional provision by violating sections 9.004(e) and 9.005(a). We examine these arguments below.

1. Texas Local Government Code Section 9.004(e)

Texas Local Government Code section 9.004(e) states:

> The ballot shall be prepared so that a voter may approve or disapprove any one or more amendments without having to approve or disapprove all of the amendments.

Tex. Loc. Gov't Code Ann. § 9.004(e). Hotze asserts that, because the primacy clause required voters approving of Proposition 1 to also disapprove of Proposition 2, the primacy clause violated section 9.004(e). This argument essentially raises a ballot-preparation challenge; as such, it was required to be raised in an election contest. Because the underlying proceeding is not an election contest, we conclude that this argument is waived.

An election contest is a special proceeding created by the Legislature to provide a remedy for elections tainted by fraud, illegality, or other irregularity. *See* Tex. Elec. Code Ann. §§ 233.001-233.014; *Blum v. Lanier*, 997 S.W.2d 259, 262 (Tex. 1999). "[A]n election contest includes any type of suit in which the validity of an election or any part of the elective process is made the subject matter of the litigation." *Rossano v. Townsend*, 9 S.W.3d 357, 362 (Tex. App.—Houston [14th Dist.] 1999, no pet.). Under the Election Code, an election contest is subject to a strict timetable: it may not be brought earlier than the day after election day and must be filed within 30 days after the return date of the election. Tex. Elec. Code Ann. § 233.006(a)-(b); *see also Hotze v. White*, No. 01-08-00016-CV, 2010 WL 1493115, at *4 (Tex. App.—Houston [1st Dist.] Apr. 15, 2010, pet. denied) (mem. op.).

A challenge similar to the issue Hotze raises here was addressed in *Arredondo v. City of Dallas*, 79 S.W.3d 657 (Tex. App.—Dallas 2002, pet. denied). There, the City argued an ordinance's inclusion on the January 1979 election ballot violated Article 1269q, which provided that "no other issue could be joined on the same ballot as a proposition to increase the salaries of the fire department and police department." *Id*. at 669. Holding that this type of challenge only could be raised in an election contest, the court stated that the City's attempt to "challeng[e] the validity of placing [the ordinance] on the 1979 election ballot" was "nothing more than a back-door attempt to contest the election more than twenty years after it was held." *Id*. at 670. Accordingly, because this issue was not raised in a timely-filed election contest, the court concluded that it was waived. *Id*.

Similarly here, Hotze's section 9.004(e) argument challenges the propriety of placing Proposition 1 and its primacy clause on the 2004 ballot. This ballot-

preparation challenge was required to be raised in an election contest; because Hotze failed to do so, this argument is waived. *See id*. at 669-70; *see also Hotze*, 2010 WL 1493115, at *4 (stating that an election contest is the "only statutory mechanism" to "challenge the process by which the City presented the propositions to the electorate").

We overrule Hotze's challenge premised on Texas Local Government Code section 9.004(e).

2. Texas Local Government Code section 9.005(a)

Texas Local Government Code section 9.005(a) states:

> A proposed charter for a municipality or a proposed amendment to a municipality's charter is adopted if it is approved by a majority of the qualified voters of the municipality who vote at an election held for that purpose.

Tex. Loc. Gov't Code Ann. § 9.005(a). Asserting the primacy clause violates this provision, Hotze argues that, because "Propositions 1 and 2 were both adopted by a majority of the voters of the City of Houston on November 2, 2004[,] . . . both Propositions must be enacted." We reject this contention.

Section 9.005(a) states that a proposed amendment is "adopted if it is approved by a majority of the qualified voters". *Id*. Here, as discussed above, both Propositions 1 and 2 were approved by a majority of the qualified voters at the November 2004 election. The results of this election were declared in the Adoption Ordinance, which states that Propositions 1 and 2 "were approved by a majority of the qualified voters voting in the Election and are ***adopted***, with Proposition 1 receiving a higher number of votes than Proposition 2." (emphasis added). Accordingly, because the primacy clause did not prevent adoption of Proposition 2 as part of the city charter, the primacy clause does not violate section

9.005(a).

We overrule Hotze's challenge premised on Texas Local Government Code section 9.005(a).

III. Attorney's Fees

In his final issue, Hotze requests that this case be remanded to the trial court so that he may seek recovery of his attorney's fees from Appellees. Because we do not sustain any of Hotze's issues challenging the trial court's summary judgment order, we reject his request regarding attorney's fees. We overrule Hotze's final issue.

RESPONSE TO THE DISSENT

Both Hotze and our dissenting colleague appear to presume the statute's use of the term "adopted" means that an ordinance must be given "effectiveness" upon adoption. Without this presumption, the question cannot be "may a home-rule municipality nevertheless deny effectiveness." Dissenting Op. at 1. We share no such presumption, particularly given the absence of any statutory language, cited precedent, or known precedent instructing otherwise.

The dissent further appears to imply that if two municipal ordinances were inconsistent without municipal interference or primacy clauses, this court should force compliance with both. Again, we are aware of no such precedent. While we recognize the equitable argument that this particular primacy clause is potentially unfair to the supporters of Proposition 2, that equitable argument was not briefed and not addressed by the dissent.

Finally, our dissenting colleague repeatedly cites Texas Local Government Code section 9.005(a) for the proposition that Proposition 2 became effective upon adoption. Clearly established rules of statutory construction dictate that, "We must

give effect to each provision of a statute so that none is rendered meaningless or mere surplusage." *TIC Energy & Chem., Inc. v. Martin*, 498 S.W.3d 68, 74 (Tex. 2016). If section 9.005(a) meant that a charter amendment was effective upon adoption, then section 9.005(b) (identifying when a charter amendment becomes effective) would be surplusage. *See Surplusage*, Black's Law Dictionary (11th ed. 2019) (defining "surplusage" as "[r]edundant words in a statute or legal instrument; language that does not add meaning"). We cannot presume that the Legislature drafted 9.005(b) to identify the date an amendment becomes effective despite already identifying when an amendment becomes effective. *See State v. Shumake*, 199 S.W.3d 279, 287 (Tex. 2006) ("In construing a statute, we give effect to all its words and, if possible, do not treat any statutory language as mere surplusage."). We also cannot presume the Legislature intended for section 9.005(a) to control effectiveness when it used the word "adopted" in (a) and "effect" in (b). *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865 (Tex. 1999) ("[I]t is cardinal law in Texas that a court construes a statute, 'first, by looking to the plain and common meaning of the statute's words.' If the meaning of the statutory language is unambiguous, we adopt, with few exceptions, the interpretation supported by the plain meaning of the provision's words and terms."); *Geters v. Eagle Ins. Co.*, 834 S.W.2d 49, 50 (Tex. 1992) (per curiam) (courts must apply ordinary meanings). We cannot enlarge the meaning and scope of section 9.005(a) given the reasonable interpretation of the law as it is written. *See Monsanto Co. v. Cornerstones Mun. Util. Dist.*, 865 S.W.2d 937, 939 (Tex. 1993) ("When applying the ordinary meaning, courts 'may not by implication enlarge the meaning of any word in the statute beyond its ordinary meaning, and implications from any statutory passage or word are *forbidden* when the legislative intent may be gathered from a reasonable interpretation of the statute *as it is written.*'") (quoting *Sexton v. Mount Olivet Cemetery Ass'n*, 720 S.W.2d 129, 138

(Tex. App.—Austin 1986, writ ref'd n.r.e.) (emphasis in original)); *see also Jasek v. Tex. Dep't of Family & Protective Servs.*, 348 S.W.3d 523, 535 (Tex. App.—Austin 2011, no pet.) ("A court may not judicially amend a statute and add words that are not implicitly contained in the language of the statute.") (citing *Lee v. City of Houston*, 807 S.W.2d 290, 295 (Tex. 1991)). Therefore, we reject the dissent's interpretation of Texas Local Government Code section 9.005(a) to mean Proposition 2 became effective upon adoption.

CONCLUSION

We affirm the trial court's September 16, 2019 summary judgment order.

/s/ Meagan Hassan
Justice

Panel consists of Justices Jewell, Zimmerer, and Hassan (Jewell, J., dissenting).

No. 21-1037

IN THE SUPREME COURT OF TEXAS
IN AUSTIN

BRUCE R. HOTZE
Petitioner,

v.

SYLVESTER TURNER, MAYOR, AND THE CITY OF HOUSTON,
Respondents.

On Appeal from the 14th Court of Appeals, Harris County
No. 14-19-00959-CV
333rd Judicial District Court
Harris County, Texas No. 2014-19507
Honorable Randy Daryl L. Moore, Judge Presiding

APPENDIX, TAB C

Affirmed and Majority and Dissenting Opinions filed October 12, 2021.

In The

Fourteenth Court of Appeals

NO. 14-19-00959-CV

BRUCE R. HOTZE, Appellant

V.

SYLVESTER TURNER, MAYOR, AND THE CITY OF HOUSTON, Appellees

On Appeal from the 333rd District Court
Harris County, Texas
Trial Court Cause No. 2014-19507

D I S S E N T I N G O P I N I O N

Appellant's lawsuit raises an important question regarding voter-initiated amendments to a home-rule municipality's charter. Under the Local Government Code, a charter amendment approved by a majority of the municipality's qualified voters is "adopted," and the amendment takes effect when declared adopted by the municipality. When a voter-initiated charter amendment has been so approved and so adopted—and declared as such—may a home-rule municipality nevertheless

deny effectiveness to that amendment if it did not meet an additional city-imposed vote threshold not otherwise required by statute? Houston voters approved the charter amendments at issue in 2004, and this dispute's meandering but well-documented path through the court system,[1] having so far taken seventeen years, has now yielded an appellate court answer. But I disagree with the answer.

A. Charter Amendment Process and the Provisions at Issue

The Texas Constitution authorizes cities of a certain population to adopt city charters, subject to such limitations as the Legislature may prescribe. Tex. Const. art. XI, § 5. One such prescription applicable to these "home-rule" cities, which include the City of Houston, relates to amending an existing charter. Under the Local Government Code, a home-rule city charter may be amended either on the city's motion or by citizen-voter initiative. *See* Tex. Loc. Gov't Code § 9.004(a). When citizens exercise their power to seek amendment, they do so by submitting a petition signed by the requisite number of qualified municipal voters. *See id.* When presented with a conforming petition, the city's governing body "shall" submit the proposed charter amendment to the voters for their approval at an election. *Id.*; *see* Houston, Tex., City Charter art. VII-b (effective 1913) (amended 1991). The proposed charter amendment is "adopted" if it is approved by majority vote. *See* Tex. Loc. Gov't Code § 9.005(a). "This form of direct democracy through 'the power of initiative and referendum, as provided for in the city's charter, is the exercise by the people of a power reserved to them, and not the

[1] I refer the reader to *In re Robinson*, 175 S.W.3d 824 (Tex. App.—Houston [1st Dist.] 2005, orig. proceeding [mand. granted]); *White v. Robinson*, 260 S.W.3d 463 (Tex. App.—Houston [14th Dist.] 2008), *vacated sub. nom. Robinson v. Parker*, 353 S.W.3d 753 (Tex. 2011); *In re Hotze*, No. 14-08-00421-CV, 2008 WL 4380228 (Tex. App.—Houston [14th Dist.] July 10, 2008, orig. proceeding) (mem. op.); *Hotze v. White*, No. 01-08-00016-CV, 2010 WL 1493115 (Tex. App.—Houston [1st Dist.] Apr. 15, 2010, pet. denied) (mem. op.); and *Turner v. Robinson*, 534 S.W.3d 115 (Tex. App.—Houston [14th Dist.] 2017, pet. denied).

exercise of a right granted.'" *Turner*, 534 S.W.3d at 130 (Busby, J., concurring) (quoting *Taxpayers' Ass'n of Harris Cty. v. City of Houston*, 105 S.W.2d 655, 657 (Tex. 1937)).

Before us is the validity and effectiveness of a city charter amendment first proposed by voter-initiated petition, placed on the ballot for approval in November 2004, and approved by a majority of those total voters who cast a vote either for or against that particular amendment. Appellant Bruce R. Hotze, a Houston citizen, participated in the effort to place the proposed charter amendment on the ballot. *Robinson*, 353 S.W.3d at 754. He signed the petition and voted in favor of the amendment. *Id.*

The proposed charter amendment was included in a 2004 City of Houston election ordinance under the heading, "Proposition No. 2." It related to "Limits on All Combined City Revenues." It is known by the litigants (and by our appellate courts in Houston) simply as "Proposition 2." Proposition 2 proposed a measure to amend the city charter by adding "a new Section 7 to Article VI-a." The ordinance set forth the proposed amendment's full text. A recitation of its complete language is unnecessary, but the following summary was included on the ballot:

> The City Charter of the City of Houston shall be amended to require voter approval before the City may increase total revenues from all sources by more than the combined rates of inflation and population, without requiring any limit of any specific revenue source, including water and sewer revenues, property taxes, sales taxes, fees paid by utilities and developers, user fees, or any other sources of revenues.

Also included in the 2004 election ordinance was a charter amendment proposed on the City's motion. The City's proposed amendment related to "Limits on Annual Increases in City Property Taxes and Utility Rates." The amendment's full text was included in the election ordinance under the heading, "Proposition

No. 1." If adopted, the City's proposed amendment would amend the city charter by "amending the first paragraph of Section 1 of Article III and adding a new Section 20 to Article IX." The City's proposed amendment would have granted the City "full authority to assess and collect any and all revenues of the city without limitation, except as to ad valorem taxes and water and sewer rates." The City included the following summary of its proposed charter amendment on the ballot:

> The Charter of the City of Houston shall be amended to require voter approval before property tax revenues may be increased in any future fiscal year above a limit measured by the lesser of 4.5% or the cumulative combined rates of inflation and population growth. Water and sewer rates would not increase more than the cumulative combined rates of inflation and population growth without prior voter approval. The Charter Amendment also requires minimum annual increases of 10% in the senior and disabled homestead property tax exemptions through the 2008 tax year.

The election ordinance also contained what this court has referred to as a "poison pill" provision, which the City contends is part of Proposition 1's text. *See Turner*, 534 S.W.3d at 119. The poison pill provision stated:

> If another proposition for a Charter amendment relating to limitations on increases in City revenues is approved at the same election at which this proposition [Proposition 1] is also approved, and if this proposition [Proposition 1] receives the higher number of favorable votes, then this proposition [Proposition 1] shall prevail and the other shall not become effective.

Given its language, the poison pill provision appears designed to allow the City to enforce only its proposed charter amendment contained in Proposition 1 so long as Proposition 1 received more votes than Proposition 2, even if the

amendments contained in both Proposition 1 and Proposition 2 were adopted by majority vote.[2]

Viewing the election ordinance as a whole, I construe "Proposition 1" as consisting of two discrete parts: (1) the City's proposed charter amendments to Articles III and IX; and (2) the poison pill provision. I construe "Proposition 2" as consisting solely of the voter-initiated charter amendment to Article VI-a.

Proposition 1 and Proposition 2 passed with a majority of votes cast on each proposition. The charter amendments contained in each proposition, therefore, were "adopted" on November 2, 2004. *See* Tex. Loc. Gov't Code § 9.004(a); *In re Robinson*, 175 S.W.3d at 829.

Although both Proposition 1 and Proposition 2 passed, Proposition 1 received more favorable votes than Proposition 2. This fact brings us to the disagreement at hand. After the election, the City determined that Proposition 2 is not valid and therefore not enforceable. *See Robinson*, 353 S.W.3d at 754; *Turner*, 534 S.W.3d at 127. The City based its position on the poison pill provision and on a separate section of the city charter applicable to "inconsistent" charter amendments.[3] According to the City, the respective charter amendments in Proposition 1 and Proposition 2 are "alternatives" to limiting city revenues. The November 2004 ballot, the City urges, presented to voters the opportunity to choose between the City's "single unified plan" on the one hand, and the voter-initiated "single unified plan" on the other.[4] The City insists that the charter

[2] I will presume the poison pill provision was included in the election ordinance as part of Proposition 1. Interestingly, no similar poison pill provision appeared at the end of Proposition 2's text in the election ordinance.

[3] *See* City Charter, art. IX, § 19. I comment on this part of the City's argument below.

[4] The public was made aware of its opportunity to consider each "plan" as alternatives, the City asserts, by being so informed through the election ordinance and other means.

amendments in both propositions are incapable of simultaneous administration and are irreconcilably inconsistent. The City has, however, enacted an ordinance declaring that the charter amendments reflected in both propositions "are adopted" (the "Adoption Ordinance.") *See* Tex. Local Gov't Code § 9.005(b) ("A charter or an amendment does not take effect until the governing body of the municipality enters an order in the records of the municipality declaring that the charter or amendment is adopted.").[5] After the City's passage of the Adoption Ordinance, each charter amendment "became part of the Houston City Charter." *Robinson*, 353 S.W.3d at 755; *Turner*, 534 S.W.3d at 121; Tex. Loc. Gov't Code § 9.005(b). In fact, today, the City's amendments to Articles III and IX proposed in Proposition 1, and the voter-initiated amendments to Article VI-a proposed in Proposition 2, are included in the city charter.[6]

B. The Arguments

Hotze is one of three plaintiffs who sued the City requesting declaratory and injunctive relief regarding the validity of, and the City's prospective compliance with, the charter amendments included in both propositions. Among other contentions, Hotze claimed that the charter amendment in Proposition 2 is valid notwithstanding the poison pill provision because the poison pill provision is itself invalid. Hotze's argument rests largely, though not exclusively, on article XI, section 5 of the Texas Constitution and Local Government Code section 9.005(a), both applicable to home-rule cities. As our state constitution makes clear, the

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Presumably, part of that educational effort included the language of the poison pill provision itself.

[5] The City and its Mayor resisted even this ministerial act until compelled by mandamus. *See In re Robinson*, 175 S.W.3d at 830, 832.

[6] The City invites us to take judicial notice of the city charter, and I accept that invitation. *See* City Charter, *available at* https://library.municode.com/tx/houston/codes/code_of_ordinances?nodeId=CH.

amendment of home-rule city charters is subject to such limitations the Legislature prescribes, and "no . . . ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State." Tex. Const. art. XI, § 5.

Local Government Code section 9.005 provides that a proposed amendment to a municipality's charter is adopted if it is approved by a majority vote. *See* Tex. Loc. Gov't Code § 9.005(a). Hotze contends that the poison pill provision is constitutionally infirm because it conflicts with section 9.005(a). *See* Tex. Const. art. XI, § 5. For that reason, Hotze argues that the City may not rely on the poison pill provision to deny Proposition 2 the force of law to which it is entitled by virtue of its adoption.

For its part, the City has maintained that only the charter amendments in Proposition 1 shall be effective and that those in Proposition 2 are invalid.[7] Ruling on competing summary judgment motions, the trial court agreed with the City and declared the charter amendments in Proposition 2 ineffective because of the poison pill provision. Principally, it is this ruling that concerns us today and on which I part ways with the majority.

C. Discussion

In part of his third issue, Hotze challenges the trial court's ruling that the charter amendment in Proposition 2 is ineffective because of the poison pill provision. The question is whether the poison pill provision is inconsistent with section 9.005(a). I would hold that it is. My colleagues in the majority conclude

[7] Contrary to the majority's assertion, the "Adoption Ordinance" does not state that "Proposition 1 was legally binding and that Proposition 2 would not be enforced." Maj. Op. at 3. That is a fair summary of the City's practical position; but the Adoption Ordinance itself declares adoption of the charter amendments proposed in both propositions without reference to whether the City intended to treat those in Proposition 2 as a dead letter.

otherwise, stating, "because the primacy clause did not prevent adoption of Proposition 2 as part of the city charter, the primacy clause does not violate section 9.005(a)." In my view, the majority misconstrues or misapprehends section 9.005(a)'s directives by overlooking the legal force attaching to a validly adopted charter amendment. As a result, the majority erroneously permits the City to impose requirements in addition to those in the Local Government Code before a voter-initiated charter amendment can become law.[8]

The City of Houston is a home-rule city, deriving its power from article XI, section 5 of the Texas Constitution. Tex. Const. art. XI, § 5; *S. Crushed Concrete, LLC v. City of Houston*, 398 S.W.3d 676, 678 (Tex. 2013). Home-rule cities possess the full power of self-government and look to the Legislature not for grants of power, but only for limitations on their powers. *Lower Colo. River Auth. v. City of San Marcos*, 523 S.W.2d 641, 643 (Tex. 1975) (citing *Forwood v. City of Taylor*, 214 S.W.2d 282 (Tex. 1948)). The present dispute turns on one such limitation: a home-rule city cannot enact an ordinance containing a provision inconsistent with Texas's constitution or general laws. *See* Tex. Const. art. XI, § 5(a); *see also BCCA Appeal Grp., Inc. v. City of Houston*, 496 S.W.3d 1, 7 (Tex. 2016). A home-rule city ordinance is thus unenforceable to the extent that it irreconcilably conflicts with a state statute. *See BCCA Appeal Grp.*, 496 S.W.3d at 7; *Dallas Merchant's & Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 491 (Tex. 1993). A general law and a city ordinance, however, "will not be held repugnant to each other if any other reasonable construction leaving both in effect can be reached." *City of Beaumont v. Fall*, 291 S.W. 202, 206 (Tex. 1927).

[8] I pause briefly to comment on a waiver argument the City advances. The City says Hotze abandoned his constitutional challenge to the poison pill provision in the trial court. By not explicitly addressing the argument, I presume the majority has rejected it. I agree, as Hotze raised the issue in, among other places, his motion for summary judgment.

Though article XI, section 5 is plain enough, other constitutional provisions similarly circumscribe the "power of suspending laws in this State" to the Legislature alone. Tex. Const. art. I, § 28; *City of Baytown v. Angel*, 469 S.W.2d 923, 925 (Tex. App.—Houston [14th Dist.] 1971, writ ref'd n.r.e.). As this court observed in *City of Baytown*, the supreme court has interpreted article I, section 28 as "applicable to municipal ordinances conflicting with state statutes." *Angel*, 469 S.W.2d at 925 (citing *Brown Cracker & Candy Co. v. City of Dallas*, 137 S.W. 342, 343 (Tex. 1911)).

Local Government Code section 9.005 states:

> (a) A proposed charter for a municipality or a proposed amendment to a municipality's charter is adopted if it is approved by a majority of the qualified voters of the municipality who vote at an election held for that purpose.

Tex. Loc. Gov't Code § 9.005(a). The parties do not appear to contest this section's meaning. Whether a charter amendment has been "adopted" is determined by examining the votes cast for or against it, irrespective of the total number of votes that may have been cast in the election. *In re Robinson*, 175 S.W.3d at 827 n.1; *Ladd v. Yett*, 273 S.W. 1006, 1011 (Tex. App.—Austin 1925, writ dism'd w.o.j.).

The respective charter amendments proposed in Proposition 1 and Proposition 2 were adopted on November 2, 2004, and became "effective" May 4, 2005, when the City declared by ordinance both propositions adopted. *See* Tex. Loc. Gov't Code § 9.005(a), (b). Consequently, both charter amendments became part of the city charter and thus carry the force of law. *See* Tex. Elec. Code § 1.005(10) ("'Law' means a constitution, statute, *city charter*, or city ordinance.") (emphasis added); *In re Petricek*, ---S.W.3d---, 2021 WL 3909908, at *3 (Tex. Sept. 1, 2021) (orig. proceeding). Any part of any municipal ordinance purporting

to deny effectiveness to a charter amendment that has been approved by a majority of the municipality's qualified voters, and hence adopted, is unenforceable. Tex. Const. art. XI, § 5; *see Minella v. City of San Antonio*, 437 F.3d 438, 440 (5th Cir. 2005) (citing *Dallas Merchant's*, 852 S.W.2d at 491).

The poison pill provision is contained in a municipal ordinance. It purports to deny effectiveness to charter amendments reflected in Proposition 2, adopted by a majority of qualified Houston voters, and now effective as part of the city charter. If the poison pill provision were allowed to stand, the result would make ineffective that which the Legislature has declared effective by operation of Local Government Code section 9.005(a). Because the poison pill provision denies effectiveness to a home-rule city charter amendment that has been adopted and has become "law," it cannot be read in harmony with section 9.005(a). Thus, the poison pill provision is unenforceable and must yield. *See* Tex. Const. art. XI, § 5 ("no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State"); *City of Wink v. Griffith Amusement Co.*, 100 S.W.2d 695, 698 (Tex. 1936) ("The rule is definitely established . . . that ordinances in conflict with the general or state law are void."); *City of Cleveland v. Keep Cleveland Safe*, 500 S.W.3d 438, 448 (Tex. App.—Beaumont 2016, no pet.) (city charter "cannot be inconsistent with the Constitution of the State and general laws of the State"); *City of Anahuac v. Morris*, 484 S.W.3d 176, 181 (Tex. App.—Houston [14th Dist.] 2015, pet. denied); *City of Wichita Falls v. Abell*, 566 S.W.3d 336, 339 (Tex. App.—Fort Worth 1978, writ ref'd n.r.e.); *see also* Tex. Att'y Gen. Op. GA-0433 (2006) ("[m]unicipal laws inconsistent with state law are void ab initio"). I would hold that the poison pill provision contained in the election

ordinance conflicts irreconcilably with section 9.005 and therefore is unconstitutional and void.

I reach this conclusion properly viewing Local Government Code chapter 9 as a limiting statute. Home-rule cities possess the full power of self-government and look to the Legislature only for limitations on their powers. *Lower Colo. River Auth.*, 523 S.W.2d at 643. Chapter 9 applies to the "amendment of a municipal charter by a municipality authorized to do so by Article XI, Section 5, of the Texas Constitution." Tex. Loc. Gov't Code § 9.001. In the home-rule context, the power of qualified voters to seek a charter amendment *independent* from the city's governing body enjoys express approbation. *Id.* § 9.004(a) ("The governing body *shall* submit a proposed charter amendment to the voters for their approval at an election if the submission is supported by a petition signed by a number of qualified voters of the municipality . . . .") (emphasis added). As the Legislature's use of the word "shall" denotes a "duty,"[9] section 9.004(a) clearly limits a municipality's power to interfere with voter-initiated charter amendments. According to the City, the poison pill provision precludes enforcement of the voter-adopted amendments to Article VI-a. Its understanding of the provision, however, is inconsistent with the Local Government Code.

The inconsistency between the poison pill provision and section 9.005(a) is even more apparent considering the Legislature's presumptive intent behind the Local Government Code. Tex. Gov't Code §§ 311.001, 311.021 (Code Construction Act). We presume, for example, a statute is effective in its entirety. *Id.* § 311.021(2). The poison pill provision, the City says, forecloses enforcement of the voter-initiated charter amendments in Proposition 2, despite their approval, adoption, and effectiveness under Local Government Code section 9.005(a) and

[9] Tex. Gov't Code § 311.016(2).

the Adoption Ordinance. As the City would have it, the voters' adoption of the charter amendments contained in Proposition 2 under section 9.005(a) is meaningless. Thus, the poison pill provision, if applied, would deny completely section 9.005(a)'s intended effect and object. *See id.* § 311.023(1), (5).

Together with a presumption of effectiveness, we presume the Legislature's intended result is just, reasonable, and feasible of execution. *Id.* § 311.021(3), (4). The City's position, and the majority's holding, frustrate these goals. Section 9.004(a) reflects a special emphasis on voter-initiated charter amendments. Whether such a proposed amendment (or any proposed amendment) becomes law turns on—and *only* on—whether it receives a majority vote by those qualified municipal voters who vote either for or against the amendment. *See* Tex. Loc. Gov't Code § 9.005(a); *Ladd*, 273 S.W. at 1011.[10] A municipality's unilateral requirement that the proposed amendment, even if approved by majority vote, must *also* garner more votes than a "competing" or "alternative" charter amendment preferred by the city's governing body imposes an additional "approval" threshold extrinsic to, and inconsistent with, the Legislature's design. Suppose the proposed charter amendments in Proposition 1 and Proposition 2 passed with 90% approval, but Proposition 1 received 1,000,001 votes and Proposition 2 received only 1,000,000. According to the City's argument, the voter-initiated amendments in Proposition 2 would never become law despite the Legislature's contrary intent as exemplified in section 9.005 and despite overwhelming voter approval. The power of home-rule city voters to amend their charters is supposed to be feasible of execution; but, under the City's blueprint, a home-rule city's governing body could

[10] While an adopted charter amendment does not "take effect" until the city passes an ordinance declaring the amendment is adopted, *see* Tex. Loc. Gov't Code § 9.005(b), that action—which occurred here—is ministerial and may be compelled by mandamus. *In re Robinson*, 175 S.W.3d at 828.

attempt to substantially diminish that power, and ultimately defeat it through effective veto, by attaching "poison pills," "primacy clauses," or like provisions to its "alternative" proposed amendments, including ones that, like these, are not "irreconcilably or substantively inconsistent" with voter-proposed amendments.[11] *See Minella*, 437 F.3d at 441 (applying similar rationale to section 9.005(b)). When a city inserts such provisions into an election ordinance, the voter-initiated charter amendment election process potentially becomes a "vain proceeding" because any voter-proposed amendment approved by majority vote and adopted by the City would, contrary to section 9.005, never become law if it did not *also* receive more votes than some other measure proposed by the City and approved. *See In re Robinson*, 175 S.W.3d at 828 (citing *City of Dallas v. Dallas Consol. Elec. St. Ry. Co.*, 148 S.W. 292, 294 (Tex. 1912)). A home-rule city's governing body is not required to like every voter-initiated charter amendment, but it *is* required to present any such proposed amendment to the voters, and to implement the measure in accordance with valid election results, consistent with due process and state law. I would not interpret section 9.005(a) as affording the Houston City Council the opportunity to frustrate the voters' will by imposing other requirements designed to control whether a charter amendment that has been adopted by majority vote is denied the force of law. *See In re Robinson*, 175 S.W.3d at 831 (applying similar reasoning to section 9.005(b)). The majority errs by interpreting section 9.005(a) otherwise.

To be clear, my view of the poison pill provision's inconsistency with section 9.005(a) would be the same even if the voter-initiated amendments in Proposition 2 received more votes than the City amendments in Proposition 1, so

[11] I agree with the trial court that the proposed amendments in Proposition 1 and Proposition 2 are not inconsistent, and thus Article IX, Section 19, of the city charter is not invoked. For that reason, I would not address the City's issue raised in its cross-appeal.

long as both propositions passed by majority vote. By its terms, the poison pill provision does not apply unless both proposed charter amendments receive a majority of votes at the election.

I conclude with a final observation. The poison pill provision, though included in the election ordinance and approved by a majority of the voters, was not itself part of the City's proposed "charter amendment" and was, the City concedes, "never intended to be included in the Charter permanently." Unlike the charter amendments approved as proposed in Proposition 1 and Proposition 2, the poison pill provision does not appear in the city charter. As the poison pill provision was never a "proposed amendment" to the charter, sections 9.004 and 9.005 do not apply to that provision as they apply to the charter amendments. This is true even if the poison pill provision was assumed by voters to have been submitted to them as part of the proposed "charter amendment." *See Zane-Cetti v. City of Fort Worth*, 269 S.W. 130, 133 (Tex. App.—Austin 1924), *aff'd*, 278 S.W. 183 (Tex. Comm'n App. 1925) (stating tax increase proposition was not "charter amendment" as contemplated by article XI, section 5, even though presented to voters as such).

The charter amendment contained in Proposition 2 either is effective or it is not. Applying the Local Government Code, it must be effective as law because it was adopted by majority vote and declared adopted by the City.[12] There can be no

[12] My colleagues in the majority construe my opinion as presuming that the charter amendments "must be given effectiveness" upon "adoption", and they commit extended discussion to that point. Maj. Op. at 14-15. A plain reading of my opinion reveals I engage no such presumption. To the extent my position was not clear, I direct the reader to the preceding paragraphs, *supra*, where I stated, "[t]he respective charter amendments proposed in Proposition 1 and Proposition 2 were adopted on November 2, 2004, and became 'effective' May 4, 2005, when the City declared by ordinance both propositions adopted", and where I stated that the charter amendment in Proposition 2 "must be effective as law because it was adopted by majority vote and declared adopted by the City." I recognize the statutory distinction between when a charter amendment is adopted (section 9.005(a)) and when it takes "effect" (section

other legal conclusion without violating state law. Once adopted, a charter amendment, having force of law under the Local Government Code, cannot be denied effectiveness by the type of municipal action attempted here. As the poison pill provision supporting the municipal act in question conflicts with state law, it cannot stand. I would therefore hold the poison pill provision violates section 9.005(a) because it purports to deny effectiveness to a charter amendment that was approved by a majority of voters and was adopted as law. For that reason, the poison pill provision runs afoul of article XI, section 5 of the Texas Constitution.

As it is unnecessary to do so in the context of this dissent, I express no opinion at this time on Hotze's arguments in his fourth issue that the City's budget ordinances for fiscal years 2011 through 2019 violate as a matter of law Article VI-a, Section 7 of the city charter.

/s/ Kevin Jewell
Justice

Panel consists of Justices Jewell, Zimmerer, and Hassan. (Hassan, J., majority)

9.005(b)). That distinction, however, has little bearing on this particular case because all agree that the charter amendments in both propositions were adopted and were declared adopted by the City. The City has thus attempted to deny effectiveness to a charter amendment that was adopted consistent with section 9.005(a) and declared adopted consistent with section 9.005(b). The charter amendment is therefore law, and the City may not rely on the poison pill provision to deny effectiveness to such an amendment.

No. 21-1037

IN THE SUPREME COURT OF TEXAS
IN AUSTIN

BRUCE R. HOTZE
Petitioner,

v.

SYLVESTER TURNER, MAYOR, AND THE CITY OF HOUSTON,
Respondents.

On Appeal from the 14th Court of Appeals, Harris County
No. 14-19-00959-CV
333rd Judicial District Court
Harris County, Texas No. 2014-19507
Honorable Randy Daryl L. Moore, Judge Presiding

APPENDIX, TAB D

CAUSE NO. 2014-19507

PJ
8B

CARROLL G. ROBINSON AND BRUCE R. HOTZE, **Plaintiffs,**	§	**IN THE DISTRICT COURT**
	§	
	§	
v.	§	
	§	**333RD JUDICIAL DISTRICT**
SYLVESTER TURNER, MAYOR, AND THE CITY OF HOUSTON,	§	
	§	
Defendants.	§	**OF HARRIS COUNTY, TEXAS**

FINAL JUDGMENT

On August 19, 2019, the Court considered: (1) Defendants' Supplemental Plea to the Jurisdiction/Motion for Summary Judgment and Motion for Reconsideration of the Court's May 2016 Order denying Defendants' Plea to the Jurisdiction and Motion for Summary Judgment; and (2) Plaintiff's Motion for Summary Judgment. The Court signed an order on September 16, 2019, denying Plaintiff's motion for summary judgment, and granting Defendants' supplemental plea/motion, in part, and denying it, in part. The Court incorporates that September 16, 2019, order here by reference.

On October 4, 2019, the Court conducted a bench trial on the remaining issues in this case. Plaintiff non-suited on the record all claims asserted for Defendants' alleged failure to include drainage fees in Proposition 1's cap. On Defendants' motion, the Court directed a verdict on Plaintiff Robinson's taxpayer claims.

After considering the pleadings and the evidence adduced at trial, the Court concludes that: (1) the City has fully complied with Proposition 1 throughout the challenged period; and (2) Plaintiff is not entitled to an award of attorney's fees under TCPRC §37.009.

Therefore, the Court orders that Plaintiff take nothing on its claims against Defendants.

All taxable court costs are to be borne by the party incurring them.

This is a final judgment, which disposes of all parties and all claims. All relief not expressly granted in this judgment is denied.

SIGNED October 29, 2019.

Daryl L. Moore
HON. DARYL L. MOORE

2032 EPO

No. 21-1037

IN THE SUPREME COURT OF TEXAS
IN AUSTIN

BRUCE R. HOTZE
Petitioner,

v.

SYLVESTER TURNER, MAYOR, AND THE CITY OF HOUSTON,
Respondents.

On Appeal from the 14th Court of Appeals, Harris County
No. 14-19-00959-CV
333rd Judicial District Court
Harris County, Texas No. 2014-19507
Honorable Randy Daryl L. Moore, Judge Presiding

APPENDIX, TAB E

CAUSE NO. 2014-19507

CARROLL G. ROBINSON AND BRUCE R. HOTZE, Plaintiffs,	§	**IN THE DISTRICT COURT**
	§	
	§	
v.	§	
	§	**333RD JUDICIAL DISTRICT**
SYLVESTER TURNER, MAYOR, AND THE CITY OF HOUSTON, Defendants.	§	**OF HARRIS COUNTY, TEXAS**

PJ
PJURZ
MFSJY

ORDER

On August 19, 2019, the Court considered: (1) Defendants' Supplemental Plea to the Jurisdiction/Motion for Summary Judgment and Motion for Reconsideration of the Court's May 2016 Order denying Defendants' Plea to the Jurisdiction and Motion for Summary Judgment; and (2) Plaintiff's Motion for Summary Judgment.

After considering these pleas/motions, responses, replies, and sur-replies on file, the attachments to the motions, responses, replies, and sur-replies, the Court's file, and arguments of counsel, the Court:

1. GRANTS Defendants' Supplemental Plea/Motion, IN PART;
2. DENIES Defendants' Supplemental Plea/Motion, IN PART; and
3. DENIES Plaintiff's Motion for Summary Judgment.

The Court concludes:

1. Plaintiff has taxpayer standing;
2. Plaintiff does not have standing under Proposition 2;
3. Governmental immunity does not bar Plaintiff's suit;
4. Proposition 2 is not effective because of Proposition 1's primacy clause; and
5. Propositions 1 and 2 are not irreconcilably or substantively inconsistent and do not trigger Art IX, §19 of the City Charter.

SIGNED September 16, 2019.

Daryl L. Moore
HON. DARYL L. MOORE

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Associated Case Party: Bruce Hotze

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