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(*VIA E-FILING*)

Mr. Blake A. Hawthorne, Clerk
Supreme Court of Texas
P.O. Box 12248
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Re: Case Number 21-0755; *Houston Police Officers' Union, et al. v. Houston Professional Fire Fighters Association, IAFF Local 341, et al.*; in the Supreme Court of Texas

Case Number 21-0518; *City of Houston, Texas v. Houston Professional Fire Fighters' Association Local 341*; in the Supreme Court of Texas

Dear Mr. Hawthorne:

Pursuant to Texas Rule of Appellate Procedure 38.7, Petitioner the City of Houston ("Houston") files this post-submission letter brief in the above-captioned cases to address (1) topics raised during oral argument questioning on November 29, 2022, and (2) erroneous assertions in the "Oral Argument Bench Book," filed by Respondents on November 28, 2022 ("Respondents' Bench Book").

***PREEMPTION APPEAL* (Case No. 21-0755)**

1. Express Preemption is Determined by Statutory Text and Prescribed Method of Operation, Not by Ultimate Outcomes, Hypotheticals, or Contingencies.

Comments at oral argument suggest that some uncertainty remains about whether this Court must determine the existence of preemptive conflicts based upon Chapter 174's and Proposition B's plain text and prescribed method of determining firefighter compensation, as Houston and HPOU argue; or whether the patent, textual conflicts at issue here can be overlooked in favor of asking if the ultimate compensation amounts generated by Chapter 174 and Proposition B could ever be the same. Respondents, like the Court of Appeals' majority, maintain, incorrectly, that, if private-sector firefighter compensation and public-sector police compensation amounts could ever overlap, no matter how speculative, hypothetical, or counter to the undisputed evidence the circumstances

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under which that convergence might occur, Proposition B cannot be preempted. Put another way, Respondents, like that majority, contend that, because a broken clock might be correct twice a day, the clock is not broken. The Court of Appeals' majority thus held, and Respondents advocated at oral argument, that preemption is, therefore, contingent upon ultimate outcomes and that, until it is known which compensation calculation will ultimately result in greater potential firefighter compensation, neither Respondents, HPOU, Houston, nor any court or lawyer attempting to advise a client on compliance will know on any given day whether Proposition B is preempted.

This misplaced focus on ultimate outcomes to determine the existence of a preemptive conflict *does not* correctly reflect either current Texas or federal preemption jurisprudence. Instead, adoption of the majority's and Respondents' novel and distorted preemption analysis would increase exponentially and improperly the burden on those claiming even express preemption to negate every potential consequence of enforcement, no matter how speculative, even in the face of starkly conflicting statutory text. Worse, it would strip preemption clauses of the very certainty and unmistakable clarity as to which of competing laws applies that such clauses were intended to express.

Under long-standing preemption jurisprudence, preemptive conflicts, particularly those barred by preemption clauses, are *not* determined by ultimate outcomes, speculative or hypothetical situations, or contingencies. Instead, they are assessed by examining the text and prescribed method of operation of both laws. For example, in *BCCA Appeal Group, Inc. v. City of Houston*, 496 S.W.3d 1, 17 (Tex. 2016), this Court found preemption of Houston's enforcement authority despite Houston's legal ability ultimately to opt out of such enforcement. This Court explained:

> We will hold an ordinance to be consistent with state laws if any '*reasonable* construction leaving both in effect can be reached.' (citation omitted). A construction that relies upon a city to opt out of the enforcement authority granted it under the ordinance–*authority we hold is inconsistent with state law*–is hardly reasonable, however. … We cannot rely on the City to decline to exercise its more stringent enforcement authority under the Ordinance—the very reason the Ordinance exists—to find consistency between the Ordinance and the statutory enforcement scheme.

Id. (second emphasis supplied).

The Fourteenth Court of Appeals has previously employed the same method of assessing preemptive conflict. In *In re W.D.H.*, 43 S.W.3d 30, 36-37 (Tex. App.—Houston [14th Dist.] 2001, pet. denied), it held that the Texas Family Code's "best interests of the child" standard, which focused on the child's desires and needs, any danger to the child, and the parents' abilities and stability, conflicted with the federal Indian Child Welfare Act's identically worded standard, which focused on the importance of maintaining the child's relationship with his or her Native American tribe, culture, and family. *Id*. at 36-37 & n.9 (citing *Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex. 1976)). While the Court acknowledged that the two standards would often yield the same result, the Court nevertheless held that it was still "not possible to comply with both" when they provided a different means to reach that result. That is precisely the situation Respondents and a different Fourteenth Court of Appeals' majority posit here.

The Texas Court of Criminal Appeals, which has decided numerous cases involving preemption of criminal laws, employs the same rule for determining when a preemptive conflict exists. In *Abrams v. State*, 563 S.W.2d 610, 614-15 (Tex. Crim. App. 1978), the Court held that a local ordinance defining "speeding" as driving faster than 30 miles per hour was "contrary to" and thus preempted by a state statute defining "speeding" as driving faster than is reasonable and prudent under the circumstances. The Court found that the existence of a preemptive conflict did not turn on the fact that, in some instances, 30 miles per hour might be the maximum reasonably prudent speed of travel. *Id.* Instead, the Court assessed preemption based upon local adoption of a standard textually different from the state standard. *Id.*

Similarly, *in Wos v. E.M.A. ex rel. Johnson*, 568 U.S. 627, 637 (2013), the U.S. Supreme Court found a preemptive conflict between a North Carolina statute (buttressed by a state Supreme Court case) permitting the state to recover a flat one-third of total tort damages recovered by a Medicaid beneficiary, and a federal Medicaid anti-lien statute which prohibited reimbursement except pursuant to a court judgment designating only those amounts actually attributable to medical expenses. While the Court conceded that the amounts allocated under the respective statutes might ultimately overlap, it nevertheless found the North Carolina statute preempted because of the textual conflict in the prescribed method of operation. It explained: "The problem is not that it [the North Carolina statute] is an unreasonable approximation in all cases. In some cases, it may well be a fair estimate. … North Carolina's statute, however, operates to allow the State to take one-third of the total recovery, even if a proper stipulation or judgment attributes a smaller percentage to medical expenses." *Id.* at 637-38; *see also PLIVA, Inc. v. Mensing*, 564 U.S 604, 623-24 (2011) (holding that state law cause

of action alleging inadequate warning label for generic drug conflicted with federal law dictating what content needed to appear on label, even though it was possible for drug manufacturer to seek and obtain FDA permission to change label).

Houston is *not* advocating that this Court ignore any actual preemptive conflict or loosen its preemption jurisprudence to allow preemption even when two laws may actually be reconciled. Instead, Houston asks that this Court evaluate the existence of preemptive conflicts here pursuant to Texas' (and the U.S. Supreme Court's) traditional preemption analysis based upon the competing statutes' text and prescribed method of operation, and not on ultimate, speculative, or contingent results, as adoption of Respondents' and the majority's idiosyncratic preemption analytical framework would require. If the Court utilizes the correct, traditional analytical framework here, then it will conclude that Proposition B and Chapter 174 cannot be reconciled and that Section 174.005, therefore, encompasses and preempts Proposition B.

2. Under the Correct Test for Preemptive Conflict, Proposition B is "Contrary" to Sections 174.002(a) and 174.021 and Thus Falls Within Section 174.005's Ambit.

Because Respondents continued to use the wrong test for assessing preemptive conflict at oral argument, they were able to ignore the stark preemptive, textual conflicts that exist here and that result in Proposition B's preemption. Worse, because Respondents focused on results and not text and method, they argued, and the Court questioned Houston as to, whether Section 174.021 would have any preemptive effect if its standards were nevertheless difficult to meet in practice.

While the stark textual conflicts here are set forth in detail in Houston's briefing at pages 36-52 (Brief on the Merits), and pages 15-22 (Reply Brief), which Houston adopts and re-urges here, Houston would highlight the following to respond directly to the Court's concerns:

- **Proposition B establishes an absolute compensation requirement, not an opening offer or collective bargaining agreement.**

Proposition B, now included in Houston's Charter, mandates that Houston pay its firefighters in all circumstances *"the same"* compensation it pays its police officers, comparable by rank and seniority, in every category of pay. It is undisputed that Houston's police officers are compensated based on *public-sector*

police officer compensation in other large metropolitan police departments in Texas. 1CR479-80.[1] The plain text of Proposition B's Charter provision, therefore, *does not* permit Houston to depart from strict compensation parity or enforce Section 174.021 even when that standard provides firefighters with larger paychecks. Consequently, unless Houston pays its firefighters what its police officers of similar rank and seniority receive in all circumstances, it will violate its Charter and Proposition B and could be sued as the result, as one justice suggested. *See, e.g.*, *Howard v. Clack*, 589 S.W.2d 748, 750 (Tex. Civ. App.—Dallas 1979, no writ) (officials of home-rule city subject to mandamus for failing to comply with duties imposed on city under city's charter). The majority's contrary ruling, therefore, both defies and rewrites the language in Proposition B. *See BCCA,* 496 S.W.3d at 18 (Court could not save ordinance from preemption by re-writing it).

Justice Busby asked during oral argument whether Proposition B could be considered to be only an "offer" Houston is required to make to HPFFA during collective bargaining. Proposition B, however, contains no such language. Moreover, Section 174.105(c) expressly provides that a public employer is not required to agree to a proposal or make a concession during collective bargaining. *See* Tex. Loc. Gov't Code § 174.105(c). Forcing Houston to use Proposition B's requirements as its opening collective bargaining "offer" would, therefore, be directly contrary to Section 174.105(c). Such a mandate would undermine the very notion of collective "bargaining."

Justice Busby also asked whether Proposition B could be viewed as an "agreement" between Houston and its firefighter union. It cannot. Proposition B was not the product of any voluntary or good faith negotiations between Houston and HPFFA under Chapter 174's collective bargaining process. *See id.* § 174.105(b) (outlining what duty to bargain collectively means). Moreover, HPFFA was also not under any definition a "party" to Proposition B even if some firefighters voted for it. To the contrary, Proposition B was an end run around collective bargaining by Respondents, apparently intended to tie Houston's hands in any future negotiations. Consequently, no reasonable definition of the term "agreement" could include Proposition B.

In particular, Proposition B also cannot be deemed to be an "agreement" in compliance with the requirements of Section 174.021 by virtue of Section 174.022(a). Section 174.022(a) permits a collective bargaining agreement to be compliant *as to Section 174.021's requirements regarding "the conditions of*

[1] Unless otherwise indicated, citations refer to the record in the specific appeal being discussed, either No. 21-0755 on preemption or No. 21-0518 on separation of powers.

employment" for the duration of the agreement. *See id.* § 174.022(a). Proposition B, of course, has nothing to do with the conditions of employment of either firefighters or police officers. Consequently, Proposition B could never be considered an agreement that would allow Houston to escape Section 174.021's requirements under Section 174.022(a).

- **Section 174.021 establishes both a ceiling and floor on firefighter compensation.**

Justice Bland observed during oral argument that Chapter 174—and, specifically, Section 174.021—serves both as a floor, cap, and a check "all the way around" against obligations imposed on a city that its taxpayers cannot meet. This reading is correct. Sections 174.002(a) and 174.021(1) require Houston to provide its firefighters with compensation and other conditions of employment that are substantially the same as compensation and conditions of employment prevailing in comparable private-sector *firefighter* employment. *See id.* §§ 174.002(a), .021(1). Section 174.021(2) also requires that Houston provide to its firefighters compensation and conditions of employment that are based on prevailing private-sector compensation and conditions of employment in the labor market area in other jobs that require the same or similar skills, ability, and training and may be performed under the same or similar conditions. *See id.* § 174.021(2). It is undisputed that working conditions for Houston's police officers are materially different than for Houston's firefighters. 1CR618.

Consequently, under a plain reading of Chapter 174 and Proposition B, it is simply not possible for Houston always to pay firefighters "the same" as comparable *police officers* and simultaneously comply with the strict requirements in Sections 174.002 and 174.021 mandating that Houston "shall provide" its firefighters with *private-sector firefighter* compensation and working conditions. *See City of San Antonio v. Int'l Ass'n of Fire Fighters, Local 624*, 539 S.W.2d 931, 935 (Tex. Civ. App.—El Paso 1976, no writ) (holding that statutory predecessor to Chapter 174 "specifically provides that the *standard* by which [firefighters'] wages are to be determined is by reference to *private* sector employment. Thus, it *excludes* the wages paid in *public* sector employment, including other City employees") (emphasis added). That conflict should end the search for a preemptive conflict with Section 174.021 and answer any question that Proposition B falls squarely under Section 174.005's preemption clause.[2]

[2] During oral argument, Respondents' counsel appears to have misspoken when stating that San Antonio has adopted both Chapter 174 and pay-parity. That is not correct. While San Antonio adopted the statutory processor to Chapter 174 to govern its employee relations with both its

- **Section 174.021 has full preemptive effect, no matter how this Court rules in Houston's Section 174.252 constitutional appeal**.

During oral argument and in Respondents' Bench Book, it also was suggested that Chapter 174 may have limited preemptive effect because there somehow can be no proof of a "private sector standard"—or that Section 174.021 would have to be declared unconstitutional if Section 174.252 is declared unconstitutional and would, therefore, be unavailable to preempt Proposition B. Neither argument is correct.

As an initial matter, the record demonstrates that Respondents have long touted evidence of private-sector firefighter standards they claim to have used in bargaining with Houston *and purported to present such evidence at oral argument*. *See, e.g.*, No. 21-0518, 1CR69, 71-72, 76-77, 82-83; 2CR258, 261, 270-73; Respondents' Bench Book at Tab J. Respondents can hardly be heard to argue otherwise since they filed suit against Houston here specifically *to enforce Section 174.021's standards*. No. 21-0518, 1CR4-8, 48-55. Such arguments also do not reflect Houston's position in either case. *See, e.g.*, Letter Brief filed by the City of Houston on July 23, 2020, in *City of Houston, Texas v. Houston Professional Fire Fighters' Association Local 341*, Case No. 14-18-00976-CV in the Fourteenth Court of Appeals; Supplemental Brief in Support of Opposed Motion for Additional Time Following Consolidation of Cases for Oral Argument or, Alternatively, to Argue the Cases Consecutively, filed November 2, 2022, at 9-16.

As demonstrated in *International Association of Firefighters, Local Union No. 2390 v. City of Kingsville*, 568 S.W.2d 391 (Tex. App.—Corpus Christi 1978, writ ref'd n.r.e.), this Court can and should hold that Section 174.252's judicial contract-making mechanism is an improper delegation under separation of powers principles without invalidating Section 174.021. This holding highlights that separate inquiries are presented in addressing (1) whether the private-sector firefighter standard in Section 174.021, which still governs collective bargaining, mediation, and arbitration, preempts Proposition B; and (2) Section 174.021's suitability under separation of powers principles to guide Section 174.252's judicial contract-making mechanism. *See City of Port Arthur v. Int'l Ass'n of Fire Fighters, Local 397*, 807 S.W.2d 894, 900 (Tex. App.—Beaumont 1991, writ denied) (constitutionality and preemption are two separate inquiries), This conclusion was

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firefighters and police officers, it has not adopted any ordinance requiring pay-parity for firefighters and police. *See* Rick Casey, Opinion, *New Police Contract Adds to Firefighters' Pain,* San Antonio Report, May 3, 2022 (discussing that under contract between city and police union, police officers will receive 3.5% pay raises for 2023 and 2024, while firefighters will receive 2.5% pay raise plus 0.5% bonus for same years under their union's contract with city).

confirmed by the fact that the two opinions before this Court in Case Nos. 21-0518 and 21-0755 do not reference one another or make either dependent upon the other. It also explains why *Respondents assured the Court of Appeals that these two cases involve separate inquiries*. *See* Supplemental Brief in Support of Opposed Motion for Additional Time Following Consolidation of Cases for Oral Argument or, Alternatively, to Argue the Cases Consecutively, filed November 2, 2022, at 8-9. Respondents raised allegations of inconsistency in Houston's argument first and only before this Court.

Equally important, *no Texas or federal court has pierced the plain language of a statute in any preemption analysis*. As discussed, this is likely because preemption is not based on results or ultimate efficacy, but rather text. In ordinary express preemption analysis, the Court does not decide whether what the legislature did was adequate for some other purpose. Instead, it decides whether the state statutory language can be reconciled with language in the local law it allegedly preempts.

Consequently, as discussed in Houston's supplemental brief in support of its motion for additional time, filed November 2, 2022, because preemption is considered a statutory analysis, this Court would ordinarily decide preemption questions *before* it engages in any constitutional analysis involving Section 174.021's suitability as a standard for judicial contract-making. *Douglas v. Seacoast Prods., Inc*., 431 U.S. 265, 271-72 (1977); *see also Blum v. Bacon*, 457 U.S. 132, 137-38 (1982); *City of Port Arthur*, 807 S.W.2d at 900; Supplemental Brief in Support of Opposed Motion for Additional Time Following Consolidation of Cases for Oral Argument, or, Alternatively, to Argue the Cases Consecutively, filed November 2, 2022, at 6-8. This is true despite Respondents' repeated insistence, without authority, that constitutionality would somehow be decided first. Deciding preemption issues first is also consistent with deciding preemption based upon text and not results.

For these reasons and those set forth in Houston's prior filings, this Court should have no doubt that Section 174.021 has full preemptive effect here.

3. Chapter 174's Collective Bargaining Provisions, Sections 174.101, *et seq.*, Provide Independent Preemptive Conflicts with Proposition B that Fall Within Section 174.005's Ambit.

At oral argument, Respondents focused exclusively on Proposition B's conflicts with Section 174.021. Respondents, therefore, ignored Houston's independent preemption arguments based on Proposition B's conflicts with Section 174.101's, *et seq*., collective bargaining requirements. Indeed, although

Respondents purported to include all relevant sections of Chapter 174 in their Bench Book, they omitted these key provisions. Yet, this Court should not forget these important provisions also conflict with Proposition B because Sections 174.101 and 174.103's provisions are *not* at issue in Houston's constitutional case, so there is no basis for any suggestion of any adverse impact on their preemptive effect from the constitutional case.

Under Section 174.101, for example, Houston must recognize Respondents as the exclusive bargaining agent for Houston firefighters. Tex. Loc. Gov't Code § 174.101. It cannot negotiate with anyone else regarding firefighter compensation and working conditions. To reinforce that exclusivity, under Section 174.103(a), HPFFA is also a made a *separate* bargaining agent from HPOU. *Id.* § 174.103(a). Under Section 174.103(b), the two exclusive agents *may not join together to negotiate with Houston* unless they do so *voluntarily*. *Id.* § 174.103(b). Indeed, under Chapter 143, applicable to Houston police officers, Houston must have separate teams negotiate with firefighter and police unions. *Id.* § 143.304(c). Proposition B, however, imposes an *involuntary* obligation on *HPOU, which is not the firefighters' exclusive agent,* to bargain *jointly* for the compensation *both* its own police officers *and* Houston firefighters of comparable rank and seniority must receive. There is simply no way to reconcile these requirements with Proposition B's mandates.

Because Proposition B mandates that firefighters receive "the same" compensation and benefits as comparable police officers receive, there will remain no compensation issues for HPFFA to negotiate with Houston. Indeed, Houston could not make and comply with a separate compensation agreement and still comply with Proposition B. Respondents have never offered means by which HPOU could avoid having to negotiate involuntarily and as the exclusive representative for both Houston police officers and firefighters, who would receive the same compensation and any new benefits under Proposition B. Consequently, these provisions independently conflict with Proposition B and Proposition B thus falls within Section 174.005's ambit.

4. Houston Has Authority to Challenge the Validity of Proposition B.

During Houston's counsel's rebuttal, several questions were asked addressing Houston's "authority" to challenge a charter provision enacted by initiative. This Court should have no concern that Houston has the requisite standing and authority to assert its challenge to Proposition B.

Although the procedural posture here is somewhat confusing, Houston did not file either of the lawsuits that are now before this Court. Instead, HPFFA filed an original petition *and sued Houston* to enforce Section 174.021 under Section 174.252 in the lawsuit before the Court in No. 21-0518. 1CR4-9. Houston's constitutional challenge to Section 174.252 is solely in defense of HPFFA's lawsuit. *See* No. 21-0518, 1CR10-11, 58-59, 66, 76-84.

Similarly, HPOU filed a declaratory judgment lawsuit challenging Proposition B, naming Houston *as a defendant* in the lawsuit that is now No. 21-0755. 1CR6-10. Houston then filed its declaratory judgment counterclaim and cross-claim challenging Proposition B. 1CR202-15. Perhaps Houston's posture was unclear based on questioning during the rebuttal as to whether Houston had conducted a "vote" before proceeding with "the lawsuit."[3] Nothing in Houston's Charter or in any Texas statute, however, requires a home-rule city to conduct a vote to authorize the defense of a lawsuit. Instead, Article II, § 1 of Houston's Charter gives Houston all the legal authority it needs to conduct its defense in the Proposition B lawsuit.

Specifically, in *Coalson v. City Council of Victoria*, 610 S.W.2d 744, 747 (Tex. 1980), this Court recognized that cities could challenge a charter amendment resulting from the initiative process as unconstitutional or preempted. The "complaints" lodged by Victoria included a constitutional challenge to the citizen-initiated charter amendment as inconsistent with a Texas statute under article XI, section 5, of the Texas Constitution. *Id.* at 746.

The Court's only concern, however, was when that challenge could take place. Because a proposition could be defeated, the Court held that there would be no case or controversy in challenging an initiative before an election approving it. *Id*. at 747. It explained: "the election will determine whether there is a justiciable issue, *at which time the respondents' complaints against the validity of the initiatory process under article 1170 may be determined by the trial court*." *Id.* (emphasis added); *see also City of Port Arthur*, 807 S.W.2d at 895-96 (deciding city's declaratory judgment suit alleging that citizen-initiated charter amendment was preempted by statutory predecessor to Chapter 174, where suit was filed after election was held and amendment had been passed by voters). This Court has never altered its position and should not do so now.

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[3] When Houston's counsel stated in the rebuttal that a vote had been taken, he was referring only to Houston City Council's vote to approve Norton Rose's contract to represent Houston in the Proposition B litigation. Houston, Tx., *Code of Ordinances*, Ord. No. 2018-0982 (Dec. 5, 2018).

Finally, Houston has the legal right to file a declaratory judgment action to challenge the validity of Proposition B. *See* Tex. Civ. Prac. & Rem. Code §§ 37.001, 37.004. In addition, this Court has also held that a city has standing to assert in a declaratory judgment action that a statute is unconstitutional when that city is charged with implementing a statute violative of the Texas Constitution.[4]

Because Proposition B was submitted by citizen petition, Houston could not correct its legal, constitutional, or financial flaws before approval. *See* Tex. Loc. Gov't Code § 9.004(d); *City of Cleveland v. Keep Cleveland Safe,* 500 S.W.3d 438, 455-56 (Tex. App.—Beaumont 2016, no pet.). But once approved and adopted, Houston had both standing and authority to challenge the validity of Proposition B.

***CONSTITUTIONAL APPEAL* (Case No. 21-0518)**

1. Chapter 174 Provides a Remedy for Respondents if Section 174.252 is Declared Unconstitutional.

Justice Bland asked during argument about the "remedy" Respondents would have if the Court were to decide that Section 174.252 is an unconstitutional delegation of legislative authority. As Houston's counsel responded, nothing in Chapter 174 prohibits the parties from continuing with collective bargaining, based upon the standards in Section 174.021, just because the judicial contract-making remedy as currently stated in Section 174.252 is unconstitutional. Indeed, for the past 44 years since the decision in *City of Kingsville*, cities that adopted Chapter 174 within the Thirteenth Court of Appeals' jurisdiction *have been operating without the judicial contract-making mechanism in Section 174.252*, which include Corpus Christi and Kingsville.

Respondents overreach when they suggest that Section 174.021 must fall if Section 174.252's contract-making mechanism is unconstitutional because judicial contract-making is the only remedy for enforcing Section 174.021. *See*

[4] *See, e.g.*, *Proctor v. Andrews*, 972 S.W.2d 729, 734 (Tex. 1998); *Nootsie v. Williamson Cty. Appraisal Dist.*, 925 S.W.2d 659, 662 (Tex. 1996) (holding that political subdivision's interest in statute that it asserted violated Texas Constitution "provides the district with a sufficient stake in this controversy to assure the presence of an actual controversy that the declaration sought will resolve"). Houston specifically alleged in its answer, counterclaim, and cross-claim in what is now No. 21-0755 that it had standing because it was charged with implementing a charter amendment that is unconstitutional, and if implemented, Houston would suffer particularized injury, including severely reduced staff, loss of essential services, and the erosion of the City's credit outlook. 1CR202-03; *see* 1CR462-67, 468-69 481-82, 484-85, 488-91, 504-05 (evidence of Houston's particularized injury).

Respondents' Bench Book at Tab D. It is not. This assertion is erroneous because Section 174.251, entitled "Judicial Enforcement Generally," remains available to enforce Section 174.021 and the remainder of Chapter 174. Tex. Loc. Gov't Code § 174.251. Section 174.251 does not suffer from Section 174.252's constitutional infirmity because Section 174.251 does not authorize a court to create substantive contract terms for parties, which is a flaw in Section 174.252 under separation of powers principles.

Another available remedy is for Respondents to engage in the process expressly permitted under Section 174.053 to petition Houston to order an election to repeal Chapter 174. Proposition B indisputably does not do that; the ballot language for Proposition B did not contain the requisite language in Section 174.053. *See id.* § 174.053(b). In view of Respondents' position that Chapter 143 gives them all the bargaining rights they need, one would assume Respondents would have by now pursued their repeal remedy. Instead, Respondents continue to seek *City of San Antonio*'s impermissible "double-barreled privilege" of enjoying all rights provided to them by Chapter 174, while also circumventing the substantive requirements of Chapter 174, to pursue what they claim will enable them to receive higher compensation under Proposition B. *See* 539 S.W.2d at 935. The Court's express preemption doctrine forbids this "heads I win, tails you lose" approach.

2. The Unconstitutional Portion of Section 174.252 Can and Should Be Severed from the Remainder of Chapter 174.

Respondents newly and wrongly assert that Section 174.021 cannot stand apart from Section 174.252's unconstitutional judicial contract-making mechanism. *See* Respondents' Bench Book at Tab D. At oral argument, counsel for Respondents made clear, however, that this contention relies on an unduly cabined reading of Section 174.021 as only providing standards for Section 174.252 *and having no other function*. Such a reading, however, is completely undercut by Section 174.022, which makes clear that the parties must actually or constructively comply with Section 174.021's standards in collective bargaining and arbitration too.

Respondents' contention also ignores this Court's well-established severability standards. "'When . . . a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter, dependent on each other, operating together for the same purpose, or otherwise so connected in meaning that it cannot be presumed the legislature would have passed the one without the other.'" *Rose*

v. Drs. Hosp., 801 S.W.2d 841, 844 (Tex. 1990) (quoting *W. Union Tel. Co. v. State*, 62 Tex. 630, 634 (1884)). "'The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last fall.'" *Id.* (same). "'If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must stand.'" *Id.* (same). Indeed, this Court is obliged, in ruling on a statute's constitutionality, "'to construe a statute so as to render it valid.'" *Id.* (quoting *Sharber v. Florence*, 115 S.W.2d 604, 606 (1938)).

As discussed above, even if its use as a judicial contract-making standard is found unconstitutional under the stringent standards governing judicial delegations (and it need not be), Section 174.021 remains "complete in itself, and capable of being executed" because it would still govern the parties' collective bargaining negotiations; could still be applied via arbitration when there is an agreement to arbitrate; and could still be enforced under Section 174.*251* even if there is no agreement to arbitrate.

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Respectfully submitted,

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