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SUPREME COURT OF TEXAS
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No. 21-0518

IN THE SUPREME COURT OF TEXAS

CITY OF HOUSTON, TEXAS,

Petitioner,

v.

HOUSTON PROFESSIONAL FIRE FIGHTERS' ASSOCIATION, LOCAL 341,

Respondent.

On Review from the Fourteenth District Court of Appeals
Nos. 14-18-00990-CV and 14-18-00976-CV

PETITIONER'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

The Association does not dispute the existence of a head-on conflict between the decision below and the 1978 decision in *City of Kingsville* with respect to Chapter 174's mechanism for judicially setting compensation rates for public employees. *Compare City of Houston v. Houston Pro. Fire Fighters' Ass'n, Loc. 341*, 626 S.W.3d 1, 22 (Tex. App.—Houston [14th Dist.[2021], pet. filed) (upholding constitutionality of Tex. Loc. Gov't Code § 174.252), *with Int'l Ass'n of Firefighters, Loc. Union No. 2390 v. City of Kingsville*, 568 S.W.2d 391, 395 (Tex. App.—Corpus Christi 1978, writ ref'd n.r.e.) (legislative delegation to judiciary violates separation of powers limits). This Court should grant review to resolve the head-on conflict.

The Association nonetheless seeks to evade review by recasting the nature of the relief it seeks in the trial court as involving only past damages. The evasion fails because this contention is erroneous.

The separation of powers problem arises because—regardless of its repeated assertions to the contrary—the Association's petition plainly does ***not*** invoke section 174.252 to obtain past damages for past purported violations of section 174.021's compensation standard. The Association does ***not*** invoke section 174.252 to obtain judicial review of public employee compensation rates set by another entity, such as an arbitrator or an agency, to assess compliance with section 174.021's standards.

The Association sued under section 174.252 on June 28, 2017, seeking a brand new, judicially created agreement between the parties governing compensation that would (1) go into effect only ***after*** the 2011-2017 Collective Bargaining Agreement expired on June 30, 2017; and (2) set future compensation rates in the first instance on a going-forward basis. 1CR4-9, 48-57. No past damages are available for purported section 174.021 violations under the 2011-2017 Collective Bargaining Agreement because section 174.022 deems that agreement to be in compliance with section 174.021. There are no past violations and no past damages for which the Association sued in its petition.

This circumstance creates a separation of powers violation because (1) the judiciary is being asked to perform an impermissible legislative rate-making function for public employee compensation that does not pertain to the judiciary; and (2) the standards used for delegating this task to the judiciary do not provide reasonably clear guidance even if such a delegation is allowed.

ARGUMENT

The association does not join issue on the cases highlighted in *Texas Boll Weevil Eradication Foundation* that rejected attempted legislative delegations to the judiciary. *See Tex. Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 468 (Tex. 1997) (citing *Chem. Bank & Tr. Co. v. Falkner*, 369 S.W.2d 427 (Tex. 1963); *Davis v. City of Lubbock*, 326 S.W.2d 699 (Tex. 1959); and *Daniel v. Tyrrell & Garth Inv. Co.*, 93 S.W.2d 372 (Tex. 1936)). It does not join issue on the point that legislative delegations to the judiciary receive extra scrutiny. *See id.* It does not join issue on case law recognizing that setting compensation rates for public employees in the first instance is a legislative function. *See* Petitioner's Br. at 22-23.

The Association argues instead that there is no separation of powers problem here because it seeks only past damages for the City's purported past violations of Chapter 174 and enforcement of Chapter 174. This contention does not withstand scrutiny.

I. The Association cannot conceal the separation of powers violation by erroneously recasting its forward-looking claim as a request for past damages.

A. The Association did not sue for past damages.

The Association says it is seeking only past damages and merely "adjudicating the past relationship" based on the City's asserted violation of section 174.021's compensation standard for the one-year period from July 1, 2017, through June 30,

2018—a period immediately after the 2011-2017 Collective Bargaining Agreement expired on June 30, 2017. Thus, according to the Association, it is not impermissibly asking the judiciary to promulgate legislative-flavored "future rules." *See* Response at 12-13, 16, 23, 36, 38-46, 51, 55, 58.

This contention fails. If it is taken at face value, then the Association lacks standing to sue because there is no past violation, no past damage, and no injury.

By definition, the City's compensation of fire fighters as established under the 2011-2017 Collective Bargaining Agreement cannot violate section 174.021's standard. This is so because section 174.022 automatically deems whatever compensation the agreed-to Collective Bargaining Agreement sets to be compliant with 174.021. *See* Tex. Loc. Gov't Code § 174.022(a) ("A public employer that has reached an agreement with an association on compensation or other conditions of employment as provided by this chapter is considered to be in compliance with the requirements of Section 174.021 as to the conditions of employment for the duration of the agreement.").

When the Association filed suit on June 28, 2017, the 2011-2017 Collective Bargaining Agreement was still in effect through June 30, 2017. 1CR4-9, 48-57. In light of section 174.022, there were no past violations when the Association filed suit; there was only an impasse in negotiations toward a potential future agreement.

The Association violates fundamental standing principles when it erroneously tries to recast its petition's forward-looking request for a new, judicially created future agreement as a request for past damages based on past violations.

Standing as a component of subject matter jurisdiction is measured based on the facts as they existed when the Association filed suit on June 28, 2017. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 n.9 (Tex. 1993). "A trial court determines its jurisdiction at the time a suit is filed. At that time, the court either has jurisdiction or it does not." *Bell v. Moores*, 832 S.W.2d 749, 754 (Tex. App.—Houston [14th Dist.] 1992, writ denied). "Jurisdiction cannot subsequently be acquired while the suit is pending." *Id.*; *see also In re Forlenza*, 140 S.W.3d 373, 376 (Tex. 2004); *Tex. Ass'n of Bus.*, 852 S.W.2d at 446 n.9; *TitleMax of Tex., Inc. v. City of Austin*, ___ S.W.3d ___, No. 01-20-00071-CV, 2021 WL 5364773, at *6 (Tex. App.—Houston [1st Dist.] Nov. 18, 2021, no pet.); *Vogler v. Pac. Life Ins. Co.*, No. 01-16-00457-CV, 2017 WL 2980177, at *5 (Tex. App.—Houston [1st Dist.] July 13, 2017, no pet.) (mem. op.); *TJFA, L.P. v. Tex. Comm'n on Env'tl Quality*, 368 S.W.3d 727, 732-33 (Tex. App.—Austin 2012, pet. denied). The Association lacks injury—and, thus, standing—to sue for past violations and past damages because section 174.022 foreclosed any past violations and past damages at the time it filed suit.

The standing entanglements arising from the Association's argument lay bare the separation of powers problem here. At the time it filed suit, the Association's claim could ***only*** look "to the future" and seek to change "existing conditions by making a new rule" setting future compensation rates for public employees. Therefore, the circumstances existing at the time of filing confirm that the Association's suit pertains to a legislative rather than a judicial function. *See* Petitioner's Br. at 22-23; *see also Brown v. Todd*, 53 S.W.3d 297, 303 (Tex. 2001) ("setting salaries for public officials and employees is a legislative power") (citing *Taxpayers' Ass'n of Harris Cnty. v. City of Houston*, 105 S.W.2d 655, 657 (Tex. 1937)); *City of Austin v. Quick*, 930 S.W.2d 678, 684 (Tex. App.—Austin 1996), *aff'd in part and rev'd in part*, 7 S.W.3d 109 (Tex. 1998).

The Association cannot convert its forward-looking request for rate-making—which must be assessed as of the time suit was filed—into a backward-looking claim for past damages by arguing that the forward-looking request was filed four years ago and the appellate process has been slow to resolve it. *See* Response at 12-13. This faulty logic renders the time-of-filing rule meaningless. The pertinent time for assessing subject matter jurisdiction is the date on which the Association filed suit in 2017, not the date on which the court of appeals issued its opinion in 2021. If the Association's claim was forward-looking when filed in 2017, it still is forward-looking now for jurisdictional purposes.

In short, the Association has painted itself into a legal corner. If it claims to have sued only for past damages and past violations, then the Association unavoidably lacks an injury and standing based on the time-of-filing rule. If the Association candidly acknowledges what it actually filed suit to do—obtain a new, judicially created agreement prospectively setting the rate for public employee compensation in the first instance to be used on a going-forward basis—then it unavoidably confirms that a legislative function is being foisted upon the judiciary.

Equally unavailing is the Association's invocation of separate litigation addressing Proposition B and the preemptive effect of Chapter 174. *See* Response at 17-18. The short answer to this contention is found in *City of Port Arthur v. Int'l Ass'n of Fire Fighters, Loc. 397*, 807 S.W.2d 894, 898 (Tex. App.—Beaumont 1991, writ denied), upon which the Association relies so heavily. Here is the short answer: Constitutionality and preemption are two distinct inquiries.

City of Port Arthur arose from a declaratory judgment action brought by the City against the fire fighters' association challenging on preemption grounds the validity of a city charter amendment requiring binding arbitration. *Id.* at 894-96. *City of Port Arthur* concluded that the charter amendment's validity must be determined "regardless of the constitutionality or unconstitutionality" of Chapter 174's predecessor statute, and the court of appeals did precisely that. *Id.* at 900. The merits

of the preemption fight regarding Proposition B do not dictate the result of a separation of powers challenge.

B. The Association's cases are inapposite.

The Association likewise relies heavily on *Key Western Life Insurance Co. v. State Board of Insurance*, 350 S.W.2d 839 (Tex. 1961), to support its contention that no separation of powers problem exists because no legislative delegation is accomplished under section 174.252. *See* Response at 13, 31, 43-48, 51-53. The Association misplaces this reliance because *Key Western* does not control the analysis here.

Key Western considered the constitutionality of a statute providing for trial courts to review certain administrative decisions by the State Board of Insurance by trial de novo. 350 S.W.2d at 845-50. This Court held that imposing such review did not violate separation of powers where the underlying administrative agency's disapproval of an insurance policy form was determined to be a quasi-judicial function. *Id.* at 849-50.

Key Western involved "a distinction between the types of decisions rendered by different administrative agencies," *id.* at 847-48, and the corresponding permissible form of judicial review. Here, no underlying administrative agency decision is at issue, and the trial court is not being asked to review one. Instead, the Association has asked the trial court directly to "declare the compensation and other

conditions to which the fire fighters were entitled under section 174.021" in the first instance. *See City of Houston*, 626 S.W.3d at 6.

The Association emphasizes certain language in *Key Western* to argue that setting the rate for fire fighters' compensation is "particular and immediate," will have no "general [or] future effect," and solely implicates a judicial function. *See* 350 S.W.2d at 847; Response at 41, 49, 55, 58. In *Chemical Bank & Trust Co.*, 369 S.W.2d at 432, this Court expressly rejected the contention that "*the Key Western* case laid down a broad rule for determining whether a function of an administrative agency is judicial or legislative" and stated:

> The [*Key Western*] court said that judicial action is "particular and immediate, rather than, as in the case of legislative or rule making action, general and future in effect." We point out, however, that the court did not intend to lay down a broad pronouncement of administrative law. The language was used only as an aid in reaching the answer to the specific question facing the court. *Key Western*, supra, 350 S.W.2d at page 847. The heart of the decision in the *Key Western* case was that the statute did not give the Insurance Board legislative discretion in approving insurance policies.

Id. at 432. *Key Western* is just as inapposite in this case as it was in *Chemical Bank & Trust Co*.

The Association also asserts that the trial court merely would be performing a "traditional" judicial function by granting the prayed-for relief in its petition—characterized as "'enforc[ing] liabilities as they stand on present or past facts and under laws supposed already to exist'"—instead of exercising legislative discretion.

See Key Western, 350 S.W.2d at 847 (quoting *Prentis v. Atlantic Coast Line*, 211 U.S. 210, 226 (1908)); Response at 13, 39, 45. The Association contends it will have to carry "a traditional evidentiary burden" in seeking its "run-of-the-mill" judicial relief. *See* Response at 39, 49. But this Court should not be swayed by the Association's erroneous and sweeping characterizations of its claim as one for "damages" to be made whole for its "past losses." *See id.* at 12-13, 39, 41-44, 49, 51, 55, 58.

This case does not present a "typical" judicial inquiry. *See id.* at 36.[1] Instead, it is based on a constitutionally infirm statute, one that imposes an anything-but-traditional judicial requirement that the trial court consider the parties' evidence—not to construe an agreement that already exists, but rather to fashion from scratch the parties' brand-new compensation agreement governing their future relations. This is a legislative function. *See Prentis*, 211 U.S. at 227 ("The nature of the final act determines the nature of the previous inquiry. . . . So, when the final act is legislative, the decision which induces it cannot be judicial in the practical sense, although the questions considered might be the same that would arise in the trial of a case."); *id.* at 228 ("Litigation cannot arise until the moment of legislation is

[1] *City of San Antonio v. International Association of Fire Fighters, Local 624, San Antonio*, 539 S.W.2d 931 (Tex. App.—El Paso 1976, no writ), does not suggest otherwise; there, the constitutionality of the statute and the nondelegation doctrine were not at issue.

past."). The statute places the trial court in the untenable position of legislating the forward-looking pay rate for public employee fire fighters. *See id.* at 226 ("The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial.").

Just as in *City of Kingsville*, 568 S.W.2d at 395-96, the Association's request unquestionably requires the trial court to exercise legislative discretion while setting the fire fighters' compensation and other conditions of their employment. The trial court will be forced to decide how the fire fighters' conditions of employment would be determined, what those appropriate employment conditions are, and the size of the labor market area. *See* Tex. Loc. Gov't Code §§ 174.021, 174.252; *City of Kingsville*, 568 S.W.2d at 395-96. All these decisions veer sharply into the policy-setting zone. *See City of Kingsville*, 568 S.W.2d at 395-96. And, insofar as a jury trial is contemplated, a related question arises: What exactly would a jury charge look like in such a case?

While the statute provides that the trial court's declaration of "the compensation or other conditions of employment" would apply "for the period, not to exceed one year, as to which the parties are bargaining," Tex. Loc. Gov't Code § 174.252(b)(2), there can be little doubt that the trial court's actions would have practical implications for every future rate negotiation, not just those involving these parties.

This rate-making function is especially problematic because it has been delegated to the trial court. The Association does not dispute that this Court has been sensitive to and "especially willing to strike down delegations of legislative authority to the judicial department." *Tex. Boll Weevil Eradication Found., Inc.,* 952 S.W.2d at 468. Nor does the Association distinguish any of the authority discussed in *Boll Weevil* where this Court has rejected legislative delegations to the judiciary. *See Chem. Bank & Trust Co.*, 369 S.W.2d at 431-33 (state banking board decision to issue bank charter was "determination of public policy" not subject to trial de novo); *Davis*, 326 S.W.2d at 713-15 ("slum area" and "blighted area" determinations by city commission was "decision of a question of pure public policy" not subject to trial de novo); *Daniel,* 93 S.W.2d at 375-76 (although court may adjudge insurance premium rates set by board of insurance commissioners as unjust or illegal, "[i]t cannot substitute its rates for those of the board"); Petitioner's Br. at 28-32. Like *Key Western*, the other cases cited by the Association do not control in these circumstances because the administrative agency decisions at issue did not involve any rate-making or setting of public policy.[2]

[2] *Cf. Scott v. Tex. State Bd. of Med. Exam'rs*, 384 S.W.2d 686, 690-91 (Tex. 1964) (medical license revocation by state board of medical examiners); *Macias v. Rylander*, 995 S.W.2d 829, 833 (Tex. App.—Austin 1999, no pet.) (suspension of customs broker license by comptroller of public accounts); *Com. Life Ins. Co. v. Tex. State Bd. of Ins.*, 808 S.W.2d 552, 555-56 (Tex. App.—Austin 1991, writ denied) (name reservation denial by state board of insurance); *Am. Diversified Mut. Life Ins. Co. v. Tex. State Bd. of Ins.*, 631 S.W.2d 805, 808-09 (Tex. App.—Austin 1982, writ ref'd n.r.e.) (denial of insurance policy form by state board of insurance); *Dep't of Pub. Safety v. Petty*,

The Association asserts that the damage remedy it seeks for past losses is not rate-making, relying on *City of Dallas v. Sabine River Authority*, No. 03-15-00371-CV, 2017 WL 2536882 (Tex. App.—Austin June 7, 2017, no pet.) (mem. op.). *See* Response at 55. *City of Dallas*, however, is inapposite. There, the City of Dallas sought a declaration that the Sabine River Authority's increased rate for wholesale water was not charged pursuant to the written contract between the parties. *City of Dallas*, 2017 WL 2536882, at *1. No statute was alleged to violate the separation of powers by conferring rate-making authority on the trial court. *Cf. Daniel*, 93 S.W.2d at 376. Instead, *City of Dallas* involved the contours of waiver of governmental immunity under the Uniform Declaratory Judgments Act where the express statutory waiver only encompassed challenging a statute or ordinance. 2017 WL 2536882, at *4. Although it did not need to reach the issue, the Austin Court of Appeals concluded that the particular increase was not a "legislative pronouncement" where it involved an agency's "unilateral[] approv[al of] a compensation rate in the context of a contract renewal between it and the City." *Id.* at *5; *see also City of Corinth v. NuRock Dev., Inc.*, 293 S.W.3d 360, 368 (Tex. App.—Fort Worth 2009, no pet.) (refusing to conclude that request to construe settlement agreement between city and developer amounted to "equivalent of a statute or municipal ordinance" to waive

482 S.W.2d 949, 952 (Tex. App.—Austin 1972, writ ref'd n.r.e.) (determination of driver's incapacity by department of public safety).

governmental immunity). Here, in stark contrast, no agency has unilaterally approved a contract-renewal rate between the City and the Association. No trial court has been asked to review that rate or construe that contract. Rather, the trial court must set the brand-new contract rate. That is the very essence of legislative rate-making.

Next, the Association misconstrues the City's reliance on *In re Johnson*, 554 S.W.2d 775 (Tex. App.—Corpus Christi 1977), *writ ref'd n.r.e., writ dism'd w.o.j.*, 569 S.W.2d 882 (Tex. 1978) (per curiam). *See* Response at 58-60. *In re Johnson* properly stands for the proposition that setting a fee for a professional service constitutes rate-making. *Id.* at 784. The City also cited *In re Johnson*, 554 S.W.2d at 779-82, as well as *Holloway v. Butler*, 828 S.W.2d 810, 812 (Tex. App.—Houston [1st Dist.] 1992, writ denied), to illustrate that at best the only time rate-making delegated to the judiciary ***may*** pass constitutional muster is when the professional serves in a court-related or -appointed capacity, such as a court reporter, master of chancery, auditor, or guardian ad litem.[3] Unlike these court-related positions pertaining to the judiciary, trial courts do not appoint public servants such as fire fighters and cannot make policy determinations to set their rates.

[3] The additional case cited by the Association also supports this proposition. *See Pogue v. Duncan*, 770 S.W.2d 867, 874 (Tex. App.—Tyler 1989, writ denied) (discussing *Wichita Cnty. v. Griffin*, 284 S.W.2d 253, 256 (Tex. App.—Fort Worth 1955, writ ref'd n.r.e.)).

Finally, the Association's discussion of the "multitude" of cases bringing private-sector compensation and conditions of employment into the public employee setting does not carry the day in these circumstances. Response at 65-66. Actually, they convey some problematic aspects of having the trial court rate-make for fire fighters. In *Davis v. District of Columbia Child & Family Services Agency*, 304 F.R.D. 51, 63-64 (D.D.C. 2014), the D.C. District Court approved using a particular matrix outlining the hourly rate for private-sector attorneys in the D.C. area as a reasonable proxy to calculate and set attorney's-fee sanctions in a case involving government attorneys.

Here, the trial court is not being asked to set attorney pay rates, nor is there any equivalent long-standing, well-accepted matrix to consult for setting fire fighter pay rates. Indeed, the trial court is being asked to legislate such a "matrix" now. The other cases cited by the Association also are distinguishable because they all involved circumstances where an underlying (federal) administrative agency, not a court, had been delegated the task of setting compensation for the public employees in the first instance and the court was reviewing those decisions.[4] They do not alter

[4] *See Bradley v. United States*, 26 Cl. Ct. 699, 705-06 (1992), *aff'd*, 1 F.3d 1252 (Fed. Cir. 1993) (concluding that decision of Assistant Secretary of the Treasury (Management) not to realign pay rates of Bureau of Engraving and Printing journeyman plate printers was not arbitrary and capricious); *see also Bradley v. United States*, 870 F.2d 1578, 1580-81 (Fed. Cir. 1989) (no abuse of discretion for Director of Bureau of Engraving and Printing to require second wage comparability study before making rate determination); *Bldg. & Const. Trades Dep't, AFL-CIO v. Turnage*, 705 F. Supp. 5, 6-7 (D.D.C. 1988) (mem. op.) (applying *Chevron, U.S.A. Inc. v. Nat'l Res. Def. Council*, 467 U.S. 837 (1984), agency deference to conclude that Wage Appeals Board

the fact that the trial court here impermissibly is being asked to engage in legislative policy-making as expressed through rate-making for public employee compensation that does not pertain to the judiciary.

II. The Association misplaces its reliance on due process void-for-vagueness standards.

The Association renews its invocations of inapposite void-for-vagueness cases under due process standards. Response at 28-32. The constitutional inquiry here does not concern due process standards under the Fourteenth Amendment to the United States Constitution or due course of law standards under the Texas Constitution. Nor do *City of Kingsville* and *City of Port Arthur*.

The City does not and cannot assert a due process challenge. Nor would one make sense here. This is not a situation where an individual or entity lacks fair notice of what conduct is proscribed before facing a criminal or civil penalty or sanction, or runs the risk of facing a detriment without fair warning. Instead, this dispute focuses on an entirely different separation of powers limitation.

As *City of Kingsville* recognized, the statute does not provide the requisite guidance to survive review under separation of powers principles. *See* 568 S.W.2d at 395-96 (concluding that legislature prescribed insufficient guidelines to guide the

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interpreted Davis Bacon Act permissibly in contract concerning construction of Veterans Administration clinic).

District Court's discretion where "several matters are left to the judgment of the District Court"). The Association again points to a slew of cases addressing snippets of the standards in employment cases, as well as to cases involving various constitutional challenges, *see* Response at 61-65, but none of these cases addresses the separation of powers. Nor does the Association respond to the City's argument that the inquiry into whether the language of Section 174.021 is sufficiently specific and complete to pass constitutional muster cannot be done in a piecemeal manner using snippets of language. In that context, it is glaring that none of those cases involve handing the judiciary the task of setting all forms of pay and all benefits for an entire class of public employees, at all ranks, all seniorities, all schedules, and all assignments. Nothing could be more quintessentially "legislative" in character. Aside from the court of appeals here (and dicta in *City of Port Arthur*), no other court appears to have concluded that a "comparable employment in the private sector" directive constitutes constitutionally sufficient guidance to convey such powers to the judiciary.

The Association cites *Holloway* and argues Chapter 174 provides more guidance than the statute at issue there, but again that standard related to something in the judiciary's purview—court reporter fees. *See* 828 S.W.2d at 812; Response at 63-64. It does not help the Association's cause here.

The Association cites *Martinez v. State*, 323 S.W.3d 493 (Tex. Crim. App. 2010), for the same proposition. Response at 64. However, *Martinez* also is distinguishable. The threshold delegation issue there was much less problematic because the courts were using civil and criminal sanctions to carry out judicial enforcement of the legislative policy of putting an end to criminal street gang nuisance, as embodied in the civil statute at issue. *See id.* at 502. Further, the statute did not involve legislative rate-making, but rather enjoining gang-related behavior after a judicial determination of public nuisance. *See id.* at 502-03. Moreover, the language was deemed clear enough where "public nuisance" and "gang activity" were statutorily defined. *See id.*

The inquiry here is two-fold. First, as discussed above, can this legislative power be delegated to the judiciary when it does not pertain to the judicial function? And second, even if the delegation is allowed, does the statute provide sufficient guidance to satisfy separation of powers principles? The answer to both questions is "No."

III. Chapter 174 requires good faith collective bargaining with respect to prevailing compensation and other conditions of employment in the private sector.

The Association largely follows the court of appeals' lead on this issue; therefore, its arguments suffer from the same infirmities. *See* Response at 66-78.

While the Association never grapples with section 174.022's limits on its standing to assert past violations and past damages at the time it filed suit, the Association nonetheless touts this provision in arguing that it had no obligation to engage in good faith collective bargaining with respect to private-sector standards for a new agreement. *Id*. at 68-70. To that end, the Association parrots the court of appeals' faulty reasoning: If section 174.022 deems that an ***existing*** Collective Bargaining Agreement complies with section 174.021, then the Association owes no duty to engage in good faith collection bargaining with respect to private-sector standards toward the formation of a ***new*** agreement. This is still a non-sequitur, just as it was when the court of appeals made the same leap. *See City of Houston*, 626 S.W.3d at 13.

The only thing section 174.022 accomplishes in this case is to defeat the Association's standing to assert a purported claim based on past damages under the time-of-filing rule. In any event, this eagerness to excise section 174.021's private-sector standards from the good faith negotiating obligation belies the Association's invocations of Chapter 174's policy to provide fire fighters with "'compensation and other conditions of employment that are substantially the same as compensation and conditions of employment prevailing in comparable private sector employment.'" *See* Response at 15 (quoting Tex. Loc. Gov't Code § 174.002(a)). It is proper to read the good faith obligation together with section

174.021's standards as a jurisdictional prerequisite to suit. Doing so is consistent with every provision in the statute and furthers the statute's policies.

In any event, the Association's factual arguments also do not withstand scrutiny. *See* Response at 67. The Lancton affidavit states that private-sector information was "obtained" and "part of the data collection . . . ." 2CR312. This affidavit does not say that the information was communicated to the City before an impasse was declared. The City's uncontradicted evidence establishes that it was not communicated. 1CR142.[5]

PRAYER FOR RELIEF

The City asks this Court to grant its petition for review; reverse the court of appeals' judgment; and hold that the Act's delegation violates separation of powers principles. Further, dismissal is warranted based on the City's plea to the jurisdiction. The City requests all other relief to which it may be entitled.

[5] The Association's response includes a lengthy aside regarding standards for good faith negotiations under federal labor law. *See* Response at 74-78. This exposition on procedures under federal labor law cannot modify the specific standards for good faith bargaining spelled out in section 174.105, or change the interplay of section 174.105 with the accompanying requirements of sections 174.008, 174.021, 174.152, 174.153, and 174.252. *See* Petitioner's Br. at 41-42.

Respectfully submitted,

/s/ *William J. Boyce*

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CERTIFICATE OF COMPLIANCE

Based on a word count run in Microsoft Word, this brief contains 4,377 words excluding the portions of the petition exempt from the word count under Texas Rule of Appellate Procedure 9.4(i)(1).

/s/ *William J. Boyce*
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CERTIFICATE OF SERVICE

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