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December 30, 2022

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By E-Filing

Blake A. Hawthorne
Clerk
Supreme Court of Texas
P.O. Box 12248
Austin, TX 78711

Re: Case No. 21-0518, *City of Houston, et al. v. Houston Professional Fire Fighters Ass'n IAFF Local 341, et al.*; Case No. 21-0755, *City of Houston, et al. v. Houston Professional Fire Fighters Ass'n IAFF Local 341, et al.*

Dear Mr. Hawthorne:

We write on behalf of the Fire Fighter Respondents in the above-captioned consolidated cases in response to the City of Houston's ("City") December 9, 2022 post-submission letter brief. We kindly request that a copy of this letter be provided to the Justices of the Court.

Most of the City's 5,000-plus words merely rehash the same preemption arguments and case law treated at length in the parties' merits briefs and arguments.[1] But nothing in the text or structure of FPERA—including its permissive remedy for judicial enforcement at the Fire Fighters Association's option, its deemed compliance if the parties agree on factors other than private-sector standards, and its basic purpose to ensure fair compensation for local firefighters—prohibits City voters from providing additional avenues for safeguarding firefighter pay. As the case law and several Justices' questions suggested, such avenues include giving

[1] The City also declares that "Respondents focused exclusively on Proposition B's conflicts with Section 174.021" and "ignored Houston's independent preemption arguments based on Proposition B's conflicts with Section 174.101's, *et seq.*, collective bargaining requirements." City Letter Br. 8. The transcript tells a different story. OA Tr. at 55:00-56:46 (counsel for the Fire Fighter Respondents addressing that issue).

firefighters a 5% raise across-the-board with other public employees, mandating binding arbitration, or ensuring at least equal pay with police officers. *See* No. 21-0755, HPFFA Merits Br. 27-46; OA. Tr. at 9:49-10:04, 11:00-11:07.

The City also strives mightily to square the circle in its insistence that it can both (a) invalidate one law as unconstitutional and disclaim its standards as nonexistent, *see* Resp. Bench Book Tab C, and at the same time (b) rely on that same law to invalidate a local City Charter provision. The City pretends to find support from constitutional-avoidance cases involving the interplay between preemption and constitutional challenges directed at the *same statute*. *See* City Letter Br. at 8 (citing *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 272 (1977); *Blum v. Bacon*, 457 U.S. 132, 138 (1982)). But those decisions have no application when a litigant tries to leverage a purportedly unconstitutional law to preempt *another* law.

The City also fails in its belated effort to limit its constitutional challenge to FPERA in Case No. 21-0518 to Section 174.252 alone, rather than to Section 174.021 as well. *See* Resp. Bench Book Tab C; OA Tr. at 3:40-3:52 (Justice Bland pointing out that Issue No. 1 of the City's brief on the merits asks whether Section 174.021 in combination with Section 174.252 should be declared unconstitutional). The Court's questioning aptly demonstrated the impossibility of de-coupling a challenge to Section 174.252's judicial-enforcement mechanism from the Section 174.021 standards that animate it. OA Tr. at 21:15-23:55; *see also* OA Tr. at 23:55-24:10 (counsel for City conceding that "there may be scenarios *depending on the standards* that are used where it is more clear that this is a separation of powers problem, or less clear") (emphasis added).

Moreover, in trying to prop up FPERA as containing meaningful safeguards for firefighter pay even if its lynchpin—Section 174.252—is struck down, the City only ends up demonstrating the severability quagmire posed by subjecting Houston firefighters to what *City of Port Arthur* correctly described as a "Collective Begging" statute. *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). Three points from the City's letter brief bear special emphasis:

- The City invokes Section 174.251's generic judicial-enforcement provision as supposedly providing all the enforcement power City firefighters need, even absent Section 174.252. City Letter Br. at 12. But the City does not explain how a court could enforce Section 174.021's private sector standard in the face of Section 174.022's provision that parties may reach agreement without reference to those standards, much

less how a court could do so in the "expeditious, effective, and binding" manner that FPERA requires. Tex. Loc. Gov't Code § 174.002(e).

- The City holds up Corpus Christi and Kingsville as two municipalities that have purportedly gotten along just fine despite the Thirteenth Court of Appeals having struck down Section 174.252's predecessor in *International Association of Firefighters, Local Union No. 2390 v. City of Kingsville*, 568 S.W.2d 391 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.). City Letter Br. at 11. But in *Kingsville*'s wake, Corpus Christi voters adopted *mandatory* arbitration to give their firefighters a meaningful enforcement remedy that would be missing here. *See Jones v. International Association of Firefighters, Local Union No. 936*, 601 S.W.2d 454 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.) (approving that voter choice). And the City of Kingsville actually operates under a collective bargaining agreement with its firefighters.[2] So neither municipality presents the impasse-without-meaningful-enforcement-mechanism scenario in which Houston firefighters have languished for over five years.

- Finally, the City suggests without even a hint of irony that if the voters dislike the modified, remedy-free statute the City hopes to thrust upon them, they need only invoke the "remedy" of repealing FPERA under Section 174.053's election process. City Letter Br. at 12. That is cold comfort from a severability perspective, even if the statutory reach of an electoral repeal were crystal clear. After all, *every* statute is subject to repeal by the legislative body that enacted it—and yet this Court must still discern what parts of a reconfigured law can stand consistent with legislative intent.

Ultimately, the Fire Fighter Respondents agree with the City's summary of this Court's severability standard: A law can stand only if "that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent." City Letter Br. at 13 (quoting *Rose v. Drs. Hosp.*, 801 S.W.2d 841, 844 (Tex. 1990)). Yet it is harder to imagine a more striking clash between the stated legislative intent in FPERA Section 174.002(e)—requiring that "alternative

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[2] *See* CBA-City-of-Kingsville-and-Fire-Assocation-Local-2390-FINAL-10-01-2022.pdf (cityofkingsville.com).

procedures must be expeditious, effective, and binding"—and excising the only such alternative procedure in the Act that meaningfully accomplishes those goals.

For these reasons, and for those outlined in the Fire Fighter Respondents' briefing and argument, both FPERA and Prop B should stand in their entirety. And under no circumstances should the Court bless the City's perverse attempt to turn FPERA into a vehicle whose only apparent purpose is to demolish—not protect—the voters' efforts to safeguard fair firefighter compensation.

Very truly yours,

Thomas R. Phillips

Thomas R. Phillips

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this letter was served on all parties by electronic filing on the 30th day of December 2022, addressed as follows:

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