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Chris Daniel - District Clerk Harris County
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**CAUSE NO. 2018-85465**

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| **THE HOUSTON POLICE OFFICERS' UNION,** | § | **IN THE DISTRICT COURT OF** |
| ***Plaintiff***, | § | |
| **v.** | § | **HARRIS COUNTY, TEXAS** |
| **HOUSTON PROFESSIONAL FIRE FIGHTERS ASSOCIATION IAFF-LOCAL 341, AND THE CITY OF HOUSTON,** | § | **157TH JUDICIAL DISTRICT** |
| ***Defendants***. | § | |

**DEFENDANT CITY OF HOUSTON'S BRIEF IN SUPPORT OF ITS APPLICATION FOR STAY OF IMPLEMENTATION, ENFORCEMENT, AND EFFECTIVE DATE OF PAY-PARITY AMENDMENT**

Defendant City of Houston (the "City") files this Brief in Support of the City's Application for Stay of Implementation, Enforcement, and Effective Date of Pay-Parity Amendment, and would show the following:

## I. INTRODUCTION

On November 30, 2018, the presiding judge of the 11th Judicial District Court of Harris County, Texas, sitting as the ancillary judge for the Harris County Civil District Courts, signed a Temporary Restraining Order ("TRO"). The TRO restrains and enjoins the City, its officers, agents, employees, attorneys, and other persons in active concert or participation with the City, from spending any taxpayer funds to implement the portion of City of Houston Ordinance No. 2018-931 that amends the City Charter by adopting Proposition B relating to firefighter compensation (the "Pay-Parity Amendment"). Plaintiff Houston Police Officers' Union

("HPOU"), which requested the TRO, has applied for a Temporary Injunction to enjoin the City to the same extent as the TRO. The Court has set a hearing on HPOU's Application for Temporary Injunction for December 14, 2018 at 1:00 p.m.

The City's answer to HPOU's Petition includes an application to stay the implementation, enforcement, and effective date of the Pay-Parity Amendment ("Stay Application"). The City has further asserted Counterclaims against HPOU and Cross-claims against Defendant Houston Professional Fire Fighters Association IAFF-Local 341 ("HPFFA") that include a request for declarations that:

- the Pay-Parity Amendment in its entirety is expressly and/or conflict preempted under TEX. LOC. GOV'T CODE § 174.005;
- the Pay-Parity Amendment is unconstitutional because it violates art. XI, § 5 of the Texas Constitution because each of the provisions of the Pay-Parity Amendment is inconsistent with the general laws enacted by the Texas Legislature, specifically, various provisions of Chapter 174 of the Texas Local Government Code;
- the Pay-Parity Amendment is void, invalid and without effect because the subject matter of the Pay-Parity Amendment has been withdrawn from the field in which the initiatory process is operative;
- the Pay-Parity Amendment is void, invalid and without effect because it purports to increase firefighter compensation without complying with the requirements of Section 141.034 and/or 174.053 of the Texas Local Government Code; and
- the Pay-Parity Amendment is invalid because it is unconstitutionally vague.

Each of the above grounds supports the City's Stay Application.

Although the City is currently restrained and enjoyed from spending taxpayer funds to implement the Pay-Parity Amendment, it is presently unknown how long the City will be so restrained, whether a temporary injunction in favor of HPOU will be issued, or the scope of any such injunction. Therefore, the City has filed its Stay Application to seek certainty that the implementation, enforcement, and effective date of the Pay-Parity Amendment will be stayed until at least the time there is a final judicial determination on the merits of the City's request for

declaratory relief, or until such time a final determination has been made on HPOU's Application for a Permanent Injunction, whichever time is longer. The Court has authority to grant this Stay Application pursuant to the broad powers this Court has under Section 174.251 of the Local Government Code.

## II. THE PAY-PARITY AMENDMENT CONFLICTS WITH, AND IS THEREFORE CONTRARY TO, VARIOUS PORTIONS OF CHAPTER 174 OF THE LOCAL GOVERNMENT CODE

### A. The Pay-Parity Amendment

Attached as Exhibit 1 is a copy of Ordinance No. 2018-931. The Pay-Parity Amendment begins on page 4. It expressly requires the City to compensate City firefighters in a manner and amount that is at least equal to and comparable by rank and seniority with the compensation provided City police officers.

Subpart a of the Pay-Parity Amendment lists nine firefighter classifications for which persons employed in those classifications are required to receive the same base pay as persons of like seniority employed in similarly numbered police officer classifications. Subparts b through l further require the City to pay firefighters employed in various positions to receive the same incentive, training, and/or mentoring pay, along with certain benefits, as purportedly similarly situated police officers. Subpart m provides that if any new form of pay or benefit is provided to police officers, the same also shall be provided to firefighters.

Nothing in the Pay-Parity Amendment requires or even allows the City to compensate City firefighters on any basis other than the pay and benefits provided to purportedly similarly situated public sector employees, *i.e.*, the City's police officers. The Pay-Parity Amendment therefore precludes the City from providing City firefighters with compensation and other conditions of employment that are based on and are substantially equal to compensation and conditions of

employment prevailing in comparable private sector employment for private sector employees similarly situated to each of the firefighter positions listed in the Pay-Parity Amendment.

### B. The City Adopted Chapter 174 of the Local Government Code to Provide for Collective Bargaining Between the City and its Firefighters

Chapter 174 is the Fire and Police Employee Relations Act. TEX. LOC. GOV'T CODE § 174.001 *et seq.* (the "FPERA"). Section 174.051 of the FPERA requires the governing body of a municipality to order an election for the adoption of Chapter 174 upon receiving a petition signed by the requisite number of qualified voters of the municipality as set forth in that section. The governing body then shall hold an election on whether to adopt Chapter 174. *Id.* at § 174.051(b) – (c).

The City of Houston conducted an election on November 4, 2003, for the qualified voters of the City to vote on a proposition to adopt Chapter 174 to provide for collective bargaining between the City and its firefighters. *See* Exhibit 2 (City of Houston Ordinance No. 2003-1049). The voters approved the proposition. *Id.* Under Section 174.052 of the FPERA, Chapter 174 became effective as to the City and the City firefighters not later than thirty days after the beginning of the City's first fiscal year after the November 4, 2003 election. It is undisputed that since that time, HPFFA – as the exclusive bargaining agent for the City's firefighters – and the City have negotiated and entered into collective bargaining agreements.

Ordinance 2003-1049 did not include an adoption of Chapter 174 to provide for collective bargaining between the City and the police officers under that statute. Ex. 2. The voters of the City have never voted to approve a proposition adopting Chapter 174 with respect to the City's police officers. Absent an adoption election conducted in accordance with the requirement of Section 174.051, the provisions of Chapter 174 cannot apply to the City's police officers. The employment terms and conditions, compensation, and benefits of the City's police officers, and

collective bargaining between the City and its police officers are instead governed by an agreement between the City and HPOU promulgated pursuant to Section 143.351 *et seq.*, of the Local Government Code. *See* Exhibit 3 (Meet and Confer Agreement between HPOU and the City). *See also* TEX. LOC. GOV'T CODE § 143.351 (providing that Subchapter J – Local Control of Police Officer Employment Matters in Municipalities with Population of 1.5 million or more – of Chapter 143 applies to a municipality with a population of 1.5 million or more but does not apply to a municipality that has adopted Chapter 174 for its police officers). That agreement is effective through December 31, 2020. Ex. 3 at 5.

### C. The Pay-Parity Amendment Conflicts with, and is Therefore Contrary to, the Provisions of Chapter 174 Requiring the City's Firefighters to be Compensated Based on Prevailing Private Sector Compensation

Section 174.002(a) of the FPERA sets forth the policy of the State of Texas that a political subdivision like the City shall 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 employment." Section 174.021 mandates that the City provide its firefighters with compensation that is "substantially equal to compensation . . . in comparable employment in the private sector." The City is further required to base the compensation of the City's firefighters "on prevailing private sector compensation . . . in other jobs that require the same or similar skills, ability, and training and may be performed under the same or similar conditions." *Id.*

In contrast, the Pay-Parity Amendment requires the City to pay its firefighters solely on the basis of what the City pays its police officers in positions purportedly similar to various firefighters' positions. Instead of being paid based on prevailing private sector compensation, the firefighters are required to be paid based on the public sector compensation of the City's police officers. That is directly contrary to the requirements of Chapter 174. *See*, *e.g.*, *City of San*

*Antonio v. Int'l Ass'n of Fire Fighters, Local 624, San Antonio*, 539 S.W.2d 931, 935 (Tex. Civ. Appl.-El Paso 1976, no writ) ("the Act specifically provides that the standard by which firemen's 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").

The Pay-Parity Amendment places the City in an irreconcilable conflict. On the one hand, the City is required by State law to pay firefighters compensation based solely on and substantially equal to compensation paid in the private sector to persons in jobs with skills, training and ability substantially similar to those held by the firefighters, under the same or similar conditions. On the other hand, the Pay-Parity Amendment requires the City to pay firefighters the same as public sector employees – i.e., police officers.

**D. The Pay-Parity Amendment Conflicts with, and is Therefore Contrary to, the Provision in Chapter 174 that Requires Firefighters and Police Officers to Have Separate Exclusive Bargaining Agents Absent an Agreement**

Section 174.101 of the FPERA requires the City to recognize an association selected by a majority of the firefighters of the fire department of the City as the exclusive bargaining agent for the firefighters. HPFFA is the exclusive bargaining agent for the City's firefighters. Section 174.102 requires the City to recognize an association selected by a majority of the police officers of the City's Police Department as the exclusive bargaining agent for the City's police officers. HPOU is the exclusive bargaining agent for the City's police officers. *See* Ex. 3.

The City's fire and police departments are separate collective bargaining units. TEX. LOC. GOV'T CODE § 174.103. The only exception to that requirement is if HPFFA and HPOU were to voluntarily join together for collective bargaining with the City. § 174.103(b). It is undisputed that HPOU has not voluntarily joined together with HPFFA for collective bargaining with the City.

The Pay-Parity Amendment effectively eviscerates the distinction between HPOU and HPFFA as exclusive bargaining agents with the City. Under subpart m of the Pay-Parity

Amendment, "if any new form of pay or benefit is provided to police officers, the same shall also be provided to Firefighters." Ex. 1. Thus, when the City and HPOU reach a new collective bargaining agreement after the current one expires on December 31, 2020, any pay or benefit increase and any new form of pay or benefit automatically inures to the City's firefighters with no negotiation whatsoever by HPFFA, the firefighter's exclusive bargaining agent. The Pay-Parity Amendment, therefore, effectively casts HPOU in the role of being the bargaining agent for both the police officers and the firefighters even though HPOU has not agreed to collectively bargain with the City on behalf of the firefighters.

### E. The Pay-Parity Amendment Conflicts with, and is Therefore Contrary to, the State Policy Enabling the City to be in Compliance with Chapter 174

Section 174.022 of the FPERA provides that a public employer that has reached an agreement with an association on compensation or other conditions of employment as provided by Chapter 174 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. The Pay-Parity Amendment precludes the City from ever being in compliance with this provision. The only way the City can comply with Section 174.022(a) is if it were to reach an agreement on compensation or other conditions of employment "as provided by this Chapter." Chapter 174 **requires** that the City pay its firefighters based on prevailing private sector compensation that is substantially equal to compensation and other conditions of employment that prevail in comparable employment in the private sector. § 174.021. The Pay-Parity Amendment, however, **requires** that the City pay its firefighters the same as the police officers, who are public sector employees.

Subpart (b) of Section 174.022 amplifies the significance of the City's inability to comply with Section 174.022(a). Under subpart (b), the City is considered to be in compliance with Section 174.021 as to the conditions of employment provided by an arbitration award for the

duration of the collective bargaining period to which the award applies. But under the Pay-Parity Amendment, the City never can be in compliance with Section 174.021 because that Amendment requires the City to pay the firefighters based on purportedly comparable public sector employment conditions and compensation, not comparable private sector employment conditions and compensation.

The above-discussed conflicts between the Pay-Parity Amendment and Chapter 174 fundamentally undermine the policy of the State of Texas for collective bargaining between a City and its firefighters to be a "fair and practical method for determining compensation and other conditions of employment." *See* TEX. LOC. GOV'T CODE § 174.002(b). The Pay-Parity Amendment effectively eliminates collective bargaining between the City and its firefighters. Whenever a police officer receives a pay increase or a new benefit, the allegedly comparable firefighter receives the same increase and the same benefit with no collective bargaining whatsoever between the City and HPFFA. The City's right to request arbitration under § 174.153 with the firefighters is effectively rendered a nullity under the Pay-Parity Amendment. There is nothing to arbitrate. Either the City pays the firefighter the same amount as his or her alleged public sector counterpart in the police department or the City is in violation of the Pay-Parity Amendment. And all the while, the City will be in violation of Chapter 174 because it is not paying the City's firefighters based on and substantially equal to prevailing private sector compensation in private sector jobs that require the same or similar skills, ability, and training of the City's firefighters.

## III. BECAUSE THE PAY-PARITY AMENDMENT CONFLICTS AND IS CONTRARY TO CHAPTER 174, IT IS PREEMPTED AND IS UNCONSTITUTIONAL

### A. Section 174.005 Expressly Preempts Contrary Local Ordinances Like the Pay-Parity Amendment

Section 174.005 of the Local Government Code states that Chapter 174 "preempts all contrary local ordinances . . . adopted by a . . . home-rule municipality." The City has established *supra* that the Pay-Parity Amendment is contrary to Chapter 174 in the following respects:

- The Pay-Parity Amendment requires the City to pay firefighters based on purportedly comparable public sector employment. Chapter 174 requires the City to pay firefighters based on comparable private sector employment;
- The Pay-Parity Amendment effectively requires HPOU to serve as the exclusive bargaining agent for the firefighters. Chapter 174 requires firefighters and police officers to be separate collective bargaining units absent an agreement, and there is no such agreement;
- The Pay-Parity Amendment precludes the City from complying with the provisions of Section 174.022 because the Pay-Parity Amendment precludes the City from complying with Section 174.021's provisions mandating that the City pay its firefighters compensation that is based on and substantially equal to similarly situated persons in the private sector.

HPFFA cannot credibly argue that Chapter 174 does not expressly supersede and preempt the Pay-Parity Amendment. In the debates leading up to the election on Proposition B, HPFFA's leadership conceded that "the collective bargaining agreement under state law Chapter 174 *supersedes* City ordinance, *charter amendment*, state law. *It supersedes it today, it supersedes it November 7,* it supersedes it *January 1,* it'll supersede it *anytime*."[1] In a separate lawsuit between the HPFFA and the City, HPFFA has requested the court to "enforce the requirements of Section 174.021" and award compensation "that is substantially equal to compensation in **comparable employment in the private sector**." *See* Cause No. 2017-42885, HPFFA's First Amended Petition at pp. 6-7 (emphasis added).

[1] *See* Proposed Charter Amendment debate, at minutes 30-50, https://www.youtube.com/watch?v=EgpyyYgogsw

When state law is contrary to a local ordinance, the court must invalidate the local ordinance. *See, e.g., City of Laredo, Texas v. Laredo Merchants Ass'n*, 550 S.W.3d 586, 588 (Tex. 2018) (holding that the Texas Solid Waste Disposal Act preempted and therefore invalidated a local anti-litter ordinance prohibiting merchants from providing "single use" plastic and paper bags to customers for point-of-sale purchases); *BCCA Appeal Grp., Inc. v. City of Houston*, 496 S.W.3d 1, 14 (Tex. 2016) (invalidating local ordinance on air quality as it was preempted by the Texas Clean Air Act and the Texas Water Code). Section 174.005 requires preemption of local ordinances contrary to Chapter 174. Chapter 174 contains clear and unmistakable language mandating that home-rule municipalities like the City must pay firefighters compensation based on and substantially equal to similarly situated persons in the private sector. The Pay-Parity Amendment, however, expressly requires the City to pay firefighters the same as public sector employees in the police department. Because the Pay-Parity Amendment cannot co-exist with Chapter 174, the Pay Parity Amendment is preempted and invalid.

### B. The Texas Constitution Renders Invalid Local Laws that Conflict with the State's General Laws

Article XI, § 5 of the Texas Constitution provides that "no [city] 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." As demonstrated *supra*, the entirety of the Pay-Parity Amendment conflicts directly with the Chapter 174, the State's "general law." Therefore, the Pay-Parity Amendment not only is preempted; it violates the Texas Constitution and is void. Indeed, the Texas Supreme Court has held that similar local laws were preempted based on their conflict with Section 143.1115, which governs some aspects of firefighter classification. *See, e.g., Tyra v. City of Houston*, 822 S.W.2d 626, 628 (Tex. 1991).

### C. The Texas Legislature Has Withdrawn the Determination of Firefighter Compensation from the Field in Which the Initiatory Process Is Operative

In addition to preemption, there can be no right or power of the citizens of a municipality to adopt an ordinance through the initiative process if the power to adopt has been expressly or impliedly withdrawn from the initiative process. *Glass v. Smith*, 244 S.W.2d 645, 649-51 (Tex. 1951) (holding that "[a]ny rights conferred by or claimed under the provisions of a city charter, including the right to an initiative election, are subordinate to the provisions of the general law"). The City's prior preemption arguments and Section 174.005's preemption provision satisfy the application of *Glass* to invalidate the Pay-Parity Agreement. *See also Tyra*, 822 S.W.3d at 627-28.[2]

Once Chapter 174 became effective for the City and the firefighters, the City was required to comply with the requirements of Chapter 174, including the requirement under Section 174.021 that firefighters' compensation must be based on and substantially equal to similarly situated persons in the private sector. While that requirement could be changed if a repeal election was conducted under the specific requirements of Section 174.053 to repeal Chapter 174 in its entirety, it is undisputed that has not occurred. The Pay-Parity Amendment certainly does not constitute a "repeal election." Section 174.053 requires the ballot in an election to repeal Chapter 174 to expressly state "[r]epeal of the adoption of the state law applicable to (fire fighters) that establishes collective bargaining . . ." No such language appeared on the ballot for Proposition B.



[2] *Tyra* is also significant because it was decided before the FPERA became effective to govern the City's employment relations with its firefighters. At the time *Tyra* was decided, Chapter 143 of the Local Government Code governed the relations between the City and its firefighters. *Id*. at 626. At that time, Chapter 143 did not contain an express preemption provision. *See* TEX. LOC. GOV'T CODE § 143.207(b) (added by Acts 1993, 73rd Leg., ch. 676, § 5, eff. Sept. 1, 1993). In contrast, Section 174.005 is an express preemption provision. Despite the absence of an express preemption provision in Chapter 143 at the time, the Texas Supreme Court in *Tyra* nevertheless applied *Glass* and held that the Legislature had withdrawn from the City's domain the authority to suspend firefighters if they failed to pass fitness procedures the City designed. 822 S.W.2d at 628.

The Pay-Parity Amendment also is not a citizen-initiated petition that meets the requirements of Section 141.034 of the Local Government Code. That section requires that a petition seeking a referendum to increase the minimum salary of firefighters or police officers must be supported by the signatures of a number of qualified voters equal to at least twenty-five percent of the voters who voted in the most municipal election, and the names of five qualified voters designed to negotiate with the City's governing body. *See* TEX. LOC. GOV'T CODE § 141.034. The ballot to be submitted to the voters for a citizen-initiative under Section 141.034 must further state the specific amount of the proposed minimum salary for each firefighter rank, pay grade, or classification, and the effective date of the proposed salary increase. *Id.* Proposition B did not meet any of these requirements. *See* Exhibit 4 (Ordinance No. 2018-610, ordering a special election on Proposition B).

Because Chapter 174 has not been repealed for the City and its firefighters, and because Proposition B plainly was not the result of a citizen-initiated petition under § 141.034, Chapter 174 has impliedly withdrawn firefighter compensation from the field in which the initiatory process is operative. Firefighter compensation under Section 174.021 is inextricably tied to the firefighters' right to collectively bargain through one agent with their public employer, the City. *See* § 174.002. The subject matter of the Pay-Parity Amendment, therefore, has been withdrawn from the field in which the initiatory process is operative. On this alternative ground, the Pay-Parity Amendment is preempted and is therefore invalid.

## IV. THE PAY-PARITY AMENDMENT IS UNCONSTITUTIONALLY VAGUE

The City's Stay Application presents a fourth alternative ground for staying the implementation, enforcement, and effective date of the Pay-Parity Amendment: the Pay-Parity Amendment is unconstitutionally vague. A statute or local ordinance is void for vagueness and lacks the first essential element of due process when it either forbids or requires the doing of an

act in terms so vague that people of common intelligence must guess as to its meaning and differ as to its application. *See Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). A local ordinance regulating business activity will be void for vagueness when the ordinance fails to give fair and adequate notice to persons regarding how to comply with the ordinance. *See, e.g., City of Webster v. Signad, Inc.*, 682 S.W.2d 644, 647-48 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e) (holding that city sign ordinance was void for vagueness because sign operators did not receive fair and adequate notice as to what sign repairs were permitted or prohibited). The fact that the local ordinance does not reach constitutionally protected conduct does not preclude the ordinance from being unduly vague and violative of due process. *See, e.g., City of Dallas v. MDII Entertainment, Inc.*, 974 S.W.2d 411, 414 (Tex. App.—Dallas 1998, no pet.).

The Pay-Parity Amendment is so vague that persons of common intelligence can only guess as to the meaning of its key provisions. For example, the Pay-Parity Amendment does not set forth the amount of compensation for each firefighter by rank and years of service. The Pay-Parity Amendment provides no means by which the City can obtain the data, details, or sufficient precision necessary to determine the adjusted compensation for each firefighter as required by the Pay-Parity Amendment. There is nothing outlining how compensation for each firefighter must be calculated. In that regard, the Pay-Parity Amendment fails to account for the fact that many firefighters are paid on an hourly basis, yet their compensation is required to be increased to match the pay of police officers who are paid on a salary basis. The Pay-Parity Amendment contains no provision explaining how, when, or with whom the City is to engage in collective bargaining or the arbitration process in Chapter 174 with respect to the City's firefighters. The Pay-Parity Amendment does not even state a date when firefighters are to receive

"the same base pay as persons of like seniority employed in the following, similarly numbered police officer classifications."

The vagueness deficiencies in the Pay-Parity Amendment are exacerbated by considering the impossible dilemma in which it places the City. How can the City comply with the requirements of state law (Chapter 174) by paying firefighter compensation based on and substantially equal to similarly situated private sector employees without violating the Pay-Parity Amendment's requirement to pay firefighters the same as public sector police officers? It cannot. The Pay-Parity Amendment simply does not give the City fair and adequate notice as to how it is to comply with an ordinance that is diametrically contrary to state law. These fatal deficiencies render the Pay-Parity Amendment void unconstitutionally vague.

## V. SECTION 174.251 AUTHORIZES THE COURT TO ISSUE AN ORDER STAYING THE IMPLEMENTATION, ENFORCEMENT, AND EFFECTIVE DATE OF THE PAY-PARITY AMENDMENT

Section 174.251 gives a district court for the judicial district in which a municipality is located broad powers appropriate to enforce Chapter 174. The district court may issue a restraining order, a temporary injunction, a permanent injunction, a contempt order, or an "other order" appropriate to enforce Chapter 174. Chapter 174 is to be "liberally construed." TEX. LOC. GOV'T CODE § 174.003.

The only requirements an entity in the City's position must satisfy to be entitled to judicial enforcement of Chapter 174 under Section 174.251 are: (a) there must be an application to enforce Chapter 174; (b) by a party aggrieved by an act or omission of the other party; (c) that relates to the rights or duties under Chapter 174. The City has filed its Stay Application. The City has been "aggrieved" by HPFFA's improper attempt to circumvent or distort the collective bargaining process with firefighters under Chapter 174, deprive the City of its rights to arbitration and judicial enforcement under Chapter 174, and violate or attempt to circumvent the limitations on the petition

processes imposed by Chapter 141 and 174 of the Local Government Code. These wrongful acts and omissions plainly relate to the City's "rights or duties" under Chapter 174 for the reasons discussed *supra*; *e.g.,* the City's duty to pay firefighters in accordance with the terms of Section 174.021, the City's rights under Section 174.022 regarding compliance with Section 174.021 as to the conditions of employment for the duration of a collective bargaining agreement and any arbitration award, and the City's duty to bargain in good faith when the City now is required to effectively ignore the collective bargaining process and simply pay the firefighters whatever the City might negotiate with a different bargaining unit on a basis other than private sector employment.

To the extent the City is required to show anything more than the above requirements to be entitled to a stay of the implementation, enforcement, and effective date of the Pay-Parity Amendment, the City easily can satisfy those requirements. In this regard, the United States Supreme Court has recognized that a request for a stay of an order on appeal or a pending federal agency order or rule is not a form of an injunction, and therefore is not subject to the requirements for allowing an injunction. *See Nken v. Holder*, 565 U.S. 418, 426 (2009). Instead, an applicant is entitled to a stay when it demonstrates the following: (1) the applicant has made a strong showing that it is likely to succeed on the merits; (2) the applicant will be irreparably injured absent a stay; (3) the issuance of a stay will not substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Id*.

The City has previously demonstrated a strong showing that it is likely to succeed on the merits of its position that the Pay-Parity Amendment is preempted, invalid, and unconstitutional. *Supra* at 9-14. Absent a stay of the implementation, enforcement, and effective date of the Pay-Parity Amendment or an order enjoining the City from implementing or complying with the

Pay-Parity Amendment, the City, its employees, and its citizens will be irreparably injured in the following respects:

- Implementation of the Pay-Parity Amendment will result in a 29% increase in firefighter compensation, which will cost the City approximately $100,000,000.00 on an annual basis;
- Because the City operates under a City Charter Revenue Cap preventing the City from raising property taxes to offset the additional costs for firefighter compensation that the Pay-Parity Amendment requires, the City is prevented from balancing its budget;
- If implemented, the Pay-Parity Amendment likely will require the City to lay off hundreds of City employees, including firefighters, police officers, and municipal employees;
- A reduction in the City firefighter and police force will decrease emergency response times;
- Fire permit and inspection fees will be increased;
- The City's ability to provide essential non-emergency services will be adversely affected by the layoffs;
- The City's credit outlook – which already has been downgraded by one credit-rating agency – may damage the City's bond rating.

Issuing a stay will not substantially injure the other parties interested in this proceeding. HPOU seeks to enjoin the City from spending any taxpayer funds to implement the Pay-Parity Amendment. While a stay would delay the ability of firefighters to receive the increased compensation that will result from the implementation of the Pay-Parity Amendment, the Court can limit that delay by setting a date in the near future for a judicial determination of the City's request for declaratory relief. If the City prevails on its request for declaratory relief that the Pay-Parity Amendment is preempted, or is unconstitutional, the firefighters never would have been entitled to receive any additional compensation under the Pay-Parity Amendment. Moreover, the absence of a stay plainly will harm those firefighters who are subject to being laid off if the City is forced to implement the Pay-Parity Amendment.

While a majority of the persons who voted in the November 6, 2018 election voted in favor of Proposition B, the harm to the public if a stay is not issued outweighs whatever interest those persons who voted in favor of Proposition B may have in seeking to have the Pay-Parity Amendment implemented immediately. No one can credibly argue that it is in the public's interest to have layoffs of first responders while a court decides whether the Pay-Parity Amendment is even valid. No one can credibly argue that it is in the public's interest for the citizens of Houston to be subject to diminished response time for emergency services during the time it will take for the court to decide the pure legal issues regarding preemption and constitutionality of the Pay-Parity Amendment.

For the reasons stated above, the City respectfully requests that the Court grant the City's application for a stay of the implementation, enforcement, and effective date of the Pay-Parity Amendment. The City further requests the Court to set a date for a hearing on the City's request for declaratory relief. The City further requests such other and further relief to which it may be entitled.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This pleading has been served upon all counsel of record in compliance with the Texas Rules of Civil Procedure on December 10, 2018.

*/s/ Reagan M. Brown*
Reagan M. Brown