

# NO. 09-0770

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IN THE  
SUPREME COURT OF TEXAS

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CITY OF HOUSTON,

Petitioner,

v.

STEVE WILLIAMS, *et al.*,

Respondents.

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On Petition for Review from the  
First District Court of Appeals at Houston, Texas

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**BRIEF OF AMICUS CURIAE CITY OF DALLAS IN  
SUPPORT OF CITY OF HOUSTON**

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THOMAS P. PERKINS, JR.  
Dallas City Attorney

CITY ATTORNEY'S OFFICE

Barbara E. Rosenberg (Texas Bar No. 17267700)  
James B. Pinson (Texas Bar No. 16017700)  
Peter Brooke Haskel (Texas Bar No. 09198900)  
Charles Estee (Texas Bar No. 06673600)  
Assistant City Attorneys

1500 Marilla Street, 7B North  
Dallas, Texas 75201  
Telephone: 214-670-3519  
Telecopier: 214-670-0622

ATTORNEYS FOR AMICUS CURIAE

## IDENTITY OF PARTIES AND COUNSEL

City of Dallas

*Amicus Curiae*

Peter Brooke Haskel  
Barbara E. Rosenberg  
James B. Pinson  
Charles Estee  
Assistant City Attorneys  
Office of the City Attorney  
City of Dallas, Texas  
7DN Dallas City Hall  
1500 Marilla Street  
Dallas, Texas 75201  
Telephone: 214-670-3519  
Telecopier: 214-670-0622  
Assistant City Attorneys

*Attorneys for Amicus Curiae*

City of Houston

*Petitioner*

Reagan D. Pratt  
The Pratt Law Firm PLLC  
1331 Lamar, Suite 1250  
Houston, Texas 77010  
Telephone: 713-936-2402  
Telecopier: 713-4810231

*Counsel for Petitioner*

Arturo Michel  
City Attorney  
Donald J. Fleming  
Senior Assistant City Attorney  
Timothy Higglely  
Senior City Attorney  
City of Houston Legal Department  
P.O. Box 368  
Houston, Texas 77001-0368  
Telephone 832-393-6299  
Telecopier: 832-393-6259

A complete listing of Respondents' names are in the Appendix B of the Petition for Review

*Respondents*

E. Troy Blakeney  
Richard C. Mumey  
Blakeney Flynn & Mumey  
1225 North Loop West, Suite 1000  
Houston, Texas 77008  
Telephone: 713-222-9115  
Telecopier: 713-222-9114

***Counsel for Respondents***

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**BRIEF OF AMICUS CURIAE CITY OF DALLAS IN  
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TO THE HONORABLE SUPREME COURT:

The City of Dallas submits this amicus brief to present argument and authority to the Court supporting the City of Houston's petition for review.

**STATEMENT OF INTEREST OF AMICUS CURIAE**

The City of Dallas has an interest in this case because it presents issues concerning subject-matter jurisdiction and immunity from suit that often arise in Dallas litigation. The issue of whether an ordinance can be construed as a contract under chapter 271 of the Local Government Code has an enormous impact on the City of Dallas.

The Dallas City Council has adopted thousands of ordinances over the years. If the court of appeals' opinion in *City of Houston v. Williams*, 290 S.W.3d 260, 266 (Tex. App.—Houston [14th Dist.] 2009, pet. filed) ("*Williams II*"), is allowed to stand, the City

of Dallas could be involved in endless litigation as to whether any provisions in its ordinances should be construed as contracts, and the City of Dallas could face untold claims for payment of amounts allegedly due under such ordinance provisions beyond the amounts budgeted or appropriated. Moreover, Dallas and other Texas cities would be compelled to set aside huge sums as reserves to pay these new-found contractual obligations.

No fee has been paid or will be paid to the City of Dallas for the preparation of this brief.

### **ISSUE PRESENTED**

Whether municipal ordinances, such as section 34-59 of the Houston City Code, are “written contracts” within the scope of chapter 271 of the Local Government Code’s limited waiver of immunity from suit.

### **SUMMARY OF ARGUMENT**

A contract is fundamentally different from an ordinance. A municipal ordinance, like other substantive laws, is not a “written contract” because there is no offer and acceptance, no execution with contractual intent, no delivery of the “contract” with contractual intent, no ability by non-city persons subject to the ordinance to refuse to accept the terms of the ordinance, and fundamentally different remedies for violating an ordinance as distinguished from breaching a contract. Moreover, construing ordinances as contracts can result in cities unlawfully incurring unfunded debts.

## ARGUMENT

Municipal ordinances are not “written contracts” within the scope of chapter 271 of the Local Government Code’s limited waiver of immunity from suit.

The general rule is that a governmental entity is immune from suit for a breach of contract action. *E.g., Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 408 (Tex. 1997). However, the Local Government Code contains a limited waiver of immunity from suit for a breach of contract claim. TEX. LOC. GOV’T CODE § 271.152. The code limits a contract subject to the waiver to:

a *written* contract stating the essential terms of the agreement for providing goods and services to the local governmental entity *that is properly executed on behalf of the local government entity*.

*Id.* § 271.151(2) (emphases added).

Respondents do not plead the existence of any single properly executed written contract. Instead, they allege that section 34-59 of the City of Houston Code of Ordinances (“section 34-59”),<sup>1</sup> when read with state statutes and with separate written agreements from 1995 and 1997, together with a 2005 collective bargaining agreement, collectively constitute a written contract that satisfies chapter 271. *Williams II*, 290 S.W.3d at 266. The court of appeals properly rejected Respondents’ attempt to cut and paste a single written contract from numerous written sources. Nevertheless, the court then erred in holding that section 34-59 was a “written contract” within the meaning of

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<sup>1</sup> Amicus App’x Tab 1.

section 271.151(2) because it was properly executed<sup>2</sup> and “promised certain benefits if . . . eligible employees perform.” *Id.* at 267 n.5. According to the court of appeals, the proper adoption of an ordinance transformed the ordinance into a “unilateral contract” that could be accepted by employees’ performance. *Id.* Without providing any analysis, the court also provided in footnote 6 of the opinion that “a similar analysis may be applied to other ordinances relevant to the firefighters’ employment. . . . [W]e do not intend to imply that they [the other ordinances] fall outside the section 271.151(2) definition.”<sup>3</sup> *Id.* at 267 n.6. The court thereby created the specter of all ordinances falling with the chapter 271 waiver of immunity.

The appellate court is wrong for the simple reason that an ordinance is and cannot be a contract. An ordinance is regulatory; a contract is consensual. Black’s Law Dictionary defines an ordinance as “an authoritative law or decree; esp.[ecially] a municipal regulation” and defines a contract as “an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.” BLACK’S LAW DICTIONARY 318, 1125 (7th ed. 1999). An ordinance is the local law of a municipality, duly enacted by the proper authorities, prescribing general, uniform, and

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<sup>2</sup> The court does not explain what execution of an ordinance means. It merely says that the City of Houston did not contend that the ordinances were not “properly executed.” *Williams II*, 290 S.W.3d at 267. The court could be referring to the signature of the mayor (HOUSTON, TEX., CHARTER art. VI, § 6) or merely the valid enactment of the ordinance.

<sup>3</sup> The fallacy of the appellate court’s holding is manifested by the court’s expressed holding that indicated that a state statute could be a contract. The court held that a state statute was not a written contract of a local government entity within the meaning of section 271.151(2) only because it was adopted by the legislature, not by the local government (and therefore was not “executed on behalf of the local governmental entity” as required for a written contract to come within section 271.151(2)). *Id.* at 267. The inescapable conclusion from this view is that “properly executed” statutes would be written contracts of the state.

permanent rules of conduct, relating to the corporate affairs of the municipality. 5 EUGENE MCQUILLAN, MUNICIPAL CORPORATION § 15:1, at 77-78 (3rd ed. 2004). The passage of an ordinance is a legislative act, a legislative function, and equivalent to legislative action. In a broad sense an ordinance is a statute. *Id.* § 15:1, at 79-80; *see also Choice v. City of Dallas*, 210 S.W. 753, 756 (Tex. Civ. App.—Amarillo 1919, no writ. (stating that while an ordinance is not technically a law, in one sense of the word, it is the local law emanating from legislative authority and operative in its limited sphere as effectively as a general law of the sovereignty).

Unlike a contract, an ordinance is not based on the bargaining, negotiation, and eventual agreement between parties. Instead, it is the result of a deliberative and reflective process of elected officials after affording members of the public an opportunity to express their opinion. *See* 5 EUGENE MCQUILLAN, MUNICIPAL CORPORATIONS § 15:1, at 79. An ordinance may authorize government officials to enter into a contract. *See e.g.*, TEX. GOV'T CODE § 1371.056(f)(2), .105(a) (ordinance authorizing execution of credit agreement), 1435.053(a) (ordinance authorizing issuance of bonds), 1508.202(a) (ordinance authorizing certificate of indebtedness). An ordinance can even include terms that are incorporated, expressly or by implication, into a separate written contract. *See, e.g.*, TEX. GOV'T CODE § 1504.006(c) (ordinance authorizing municipal bonds can include bond covenants). But the ordinance itself is not the contract. In other contexts, the Legislature repeatedly and consistently distinguishes

between ordinances and contracts. For example, when a water district<sup>4</sup> dissolves, the district's ordinances "cease to be in effect," but the district's contracts survive in accordance with their terms.<sup>5</sup>

Further, it is incontrovertible that statutes are not contracts—persons in the state are bound by its laws whether they choose to be or not. *See United States v. Masat*, 948 F.2d 923, 934 (5th Cir. 1991), *cert. denied*, 506 U.S. 835 (1992) (rejecting argument that a criminal defendant can opt not to be subject to prosecution under federal tax laws by declaring himself a "non-citizen," "non-resident," and "freeman"); *Barcroft v. State*, 881 S.W.2d 838, 839-40 (Tex. App.—Tyler 1994, no pet.) (Uniform Commercial Code contract-law provisions rejected as basis for avoiding criminal liability for speeding); *Kimmell v. Leoffler*, 791 S.W.2d 648, 650 n.1 (Tex. App.—San Antonio 1990, no writ) (rejecting as meritless arguments including one based on "commercial capacity" against jurisdiction of justice court to prosecute traffic offense), *overruled on other grounds*, *Ruiz v. Conoco, Inc.*, 868 S.W.2d 752, 757 (Tex. 1993); *Coyle v. State*, 775 S.W.2d 843, 847 (Tex. App.—Dallas 1989, no pet.) (rejecting argument that defendant's cancellation of "all contracts that would require her, in her view, to recognize any authority other than God" excused her from obeying Texas law requiring her to have an operator's license if she drove a motor vehicle on a public road). If statutes were contracts, local government entities, individuals, and others would be free to disregard the laws if they paid damages caused by their violations; would be able to seek rescission, specific performance,

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<sup>4</sup> A water district is another "local government entity" to which Local Government Code §§ 271.151 *et seq.* apply. TEX. LOC. GOV'T CODE § 271.151(3)(C))

<sup>5</sup> TEX. AGRIC. CODE § 201.0511(a), (b) (dissolution of water district).

reformation, and other contractual remedies; and would even be able to assume or reject burdensome laws in bankruptcy. This is simply not the way things are in Texas or in the United States. *See generally Greenstreet v. Heiskell*, 940 S.W.2d 831 (Tex. App.—Amarillo 1997, no pet.) (detailed discussion and rejection of various theories propounded by so-called “Republic of Texas” for the proposition that “citizens” of that group could opt out from Texas laws). Ordinances are the legislative enactments of local government governing bodies just as statutes are the enactments of the Texas Legislature. *Guillen v. City of San Antonio*, 13 S.W.3d 428, 433 (Tex. App.—San Antonio 2000, pet. denied) (“A statute is a formal written enactment of a legislative body, whether federal, state, city or county, and an ordinance in its most common meaning, is used to designate the enactments of the legislative body of a municipal corporation.”).

Moreover, ordinances, like statutes, are adopted or enacted—not “executed.” Written contracts are executed and delivered. *Prime Prods., Inc. v. S.S.I. Plastics, Inc.*, 97 S.W.3d 631, 636 (Tex. App.—Houston [1st Dist.] 2002, pet. denied); *Copeland v. Alsobrook*, 3 S.W.3d 598, 604 (Tex. App.—San Antonio 1999, pet. denied). Houston’s charter provides that ordinances can be signed by the Mayor, but the charter further provides that his failure to sign an ordinance does not prevent it from becoming effective if it has been passed by the City Council. HOUSTON, TEX., CHARTER art. VI, § 6.<sup>6</sup> Hence, under its charter, a Houston ordinance can be perfectly valid without ever having been “executed.” The Houston charter scheme for dispensing with the mayor’s signature

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<sup>6</sup> Online at hypertext link from Houston Charter, Article VI, section 6 at [http://library7.municode.com/default-test/home.htm?infobase=10123&doc\\_action=whatsnew](http://library7.municode.com/default-test/home.htm?infobase=10123&doc_action=whatsnew) (last visited November 17, 2009).

on ordinances is generally consistent with state law applicable to general law municipalities, which provides in pertinent part:

If the mayor does not sign an ordinance or resolution before the fourth day after the date it is placed in the secretary's office and does not return the ordinance or resolution under Subsection (c), the ordinance or resolution takes effect as provided by law.

TEX. LOC. GOV'T CODE § 52.003(c). Thus, no state constitutional provision, statute, or rule requires that any particular city official sign an ordinance after a city's governing body has voted on it in order for the ordinance to become effective.<sup>7</sup> It would be strange indeed if a city could avoid waiving immunity from suit by the simple expedient of having its mayor decline to sign ordinances. But that would be the inevitable consequence if the opinion were permitted to stand in the instant case. This ridiculous result simply could not have been the intent of the legislature, and it was not.

The legislature did not intend to treat ordinances as contracts for the purposes of waiving immunity from suit. Hence, the lower court's reliance on city officials having "executed" an ordinance simply is misplaced. *See Williams II*, 290 S.W.3d at 267. If indeed section 34-59 was "executed" by any city representative signing it, there is no indication that the signing was with contractual intent. Other courts, when examining similar civil service ordinances that were alleged to be written contracts, have held that such ordinances do not to create an express contract. *Seals v. City of Dallas*, 249 S.W.3d 750, 756-57 (Tex. App.—Dallas 2008, no pet.) (citing *Byars v. City of Austin*, 910 S.W.2d 520, 522-24 (Tex. App.—Austin 1995, writ denied). Requiring express

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<sup>7</sup> By contrast, the mayor and at least one other designated official must sign municipal bonds. TEX. GOV'T CODE § 1501.258. A bond is a form of contract—not an ordinance.

contractual intent is consistent with the requirements for a contract. A written contract is created by (1) an offer; (2) an acceptance; (3) a meeting of the minds; (4) each party's consent to the terms; and, (5) execution and delivery of the contract with the intent that it be mutual and binding. *Prime Prods., Inc.*, 97 S.W.3d at 636; *Copeland*, 3 S.W.3d at 604. Here no written contract was executed with contractual intent or delivered. There was no written contract.

Yet another reason exists for ensuring the distinction between an ordinance and a contract. When a court is called upon to construe or interpret an ordinance, the primary duty of the court is to ascertain and effectuate the intent of the municipal legislative body. *Bolton v. Sparks*, 362 S.W. 2d 946, 951 (Tex. 1962). However, if a contract is involved, the duty is to ascertain and effectuate the intent of the contracting parties. *Don Bldg. Supply, Inc. v. One Beacon Ins. Co.*, 267 S.W. 3d 20, 23 (Tex. 2008). The controlling intents could easily conflict and place courts in the untenable position of weighing the respective intents.

And there is still another important reason for rejecting the court of appeals' characterization of the ordinance as a contract: If construed as a contract, section 34-59 would impermissibly cause the City of Houston to have incurred contractual debt within a current year without also providing for a sinking fund or other immediate way to pay that debt. Indeed, every city in the state would have to comb through its ordinances to look for unlawful contractual debt that none ever suspected that the city had incurred. *See* TEX. CONST. art. XI, § 5 ("no debt shall ever be created by any city, unless at the same time provision be made to assess and collect annually a sufficient sum to pay the

interest thereon and creating a sinking fund of at least two per cent”); *McNeill v. City of Waco*, 33 S.W. 322, 323-24 (Tex. 1895) (such constitutional provisions “intended as restraints upon the power of municipal corporations to contract that class of pecuniary liabilities not to be satisfied out of the current revenues, or other funds within their control lawfully applicable thereto, and which would therefore, at the date of the contract, be an unprovided-for liability, and properly included within the general meaning of the word ‘debt.’”); *see also Brown v. Jefferson County*, 406 S.W.2d 185 (Tex. 1966); *T. & N.O. R.R.*, 169 S.W.2d 173 (Tex. 1943).<sup>8</sup>

Municipal ordinances are interpreted under the same rules of construction that apply to statutes. *Bd. of Adjustment v. Wende*, 92 S.W.3d 424, 430 (Tex. 2002). It is elementary that a statute or an ordinance will not be interpreted in such a way as to render it unconstitutional if by any reasonable construction it may be held constitutional. *McKinney v. Blankenship*, 282 S.W.2d 691, 697 (Tex. 1955). A contract made in violation of article XI, section 5 is unconstitutional and void. *B.L. Nelson & Assocs. v. City of Argyle*, 535 S.W.2d 906, 910 (Tex. Civ. App.—Fort Worth 1976, writ ref’d n.r.e). The court of appeals’ construction of the ordinances as contracts renders the claimed contract void. The only reasonable construction is that the ordinance is only an ordinance; not a contract. Therefore, no constitutional issue arises because section 34-59 is not a “contract.”

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<sup>8</sup> The newly-declared “contract” would also be void as violative of Houston City Code article XV, section 15-1 (online via hypertext link from [http://library7.municode.com/default-test/home.htm?infobase=10123&doc\\_action=whatsnew](http://library7.municode.com/default-test/home.htm?infobase=10123&doc_action=whatsnew)), which prohibits and declares null and void “contracts” in which city employees have an interest.

The folly of the court of appeals' holding is further revealed in three regards. First, if an ordinance is a contract, then a city will never be able to alter or amend its ordinances without the consent of the potential claimants unless the city is willing to risk breach of contract claims. In a recent decision, a court of appeals recognized that ordinances are comparable to statutes and not contracts. *City of Corinth v. NuRock Dev., Inc.*, 293 S.W.3d 360, 368-69 (Tex. App.—Fort Worth 2009, no pet.). A developer sought declaratory relief concerning a settlement agreement it had entered into with a city. The developer tried to argue that the settlement agreement was an ordinance and a legislative act. The court rejected the argument, noting that a settlement agreement lacked the characteristics of an ordinance or statute.

Second, while the court of appeals highlighted the ordinances that were important to Respondents' claims, those ordinances were not the essential terms of a purported employment contract as required under chapter 271. The ordinance does not state how much each Respondent is to be paid. The essential terms of an employment contract include compensation. *See Martin v. Credit Protection Ass'n, Inc.*, 793 S.W.2d 667, 669 (Tex. 1990); *Farone v. Bag'n Baggage, Ltd.*, 165 S.W.3d 795, 801-02 (Tex. App.—Eastland 2005, no pet.).

Third, chapter 271 provides a waiver for breach of contract damage claims. Respondents' claim is that Houston violated statutes, not a contract. *Compare Williams II*, 290 S.W.3d at 263 (stating the claims were unchanged since the first opinion), *with City of Houston v. Williams*, 183 S.W.3d 409, 419-426 (Tex. App.—Houston [14th Dist.] 2005) (stating respondents' claims were based on violations of statutes), *rev'd and*

*remanded*, 216 S.W.3d 827 (Tex. 2007) (per curiam) (*Williams I*). In fact, the Texas Legislature considered this type of claim to be based on the violation of statutes and ordinances.

After this Court's decision in *Williams I*, which held that there was not a waiver of immunity for Respondents' complaints under the statute and ordinances, the legislature responded by enacting a waiver of immunity allowing claims for firefighters and police officers for back-pay compensation under ordinances and statutes. See TEX. LOC. GOV'T CODE § 180.006. The legislature based its decision to waive immunity on this Court's decisions that precluded police officers and firefighters from obtaining back pay because statutes and civil service ordinances did not waive immunity from suit. HOUSE RESEARCH ORGANIZATION, BILL ANALYSIS, Tex. H.B. 1473, 80th Leg., R.S. (Apr. 30, 2007) (App'x Tab 2). The legislature was particularly concerned with the cases that followed *Williams I*. *Id.* (citing *Bell v. City of Grand Prairie*, 221 S.W.3d 317 (Tex. App.—Dallas 2007, no pet.)).<sup>9</sup> In *Bell*, which relied on *Williams I*, the court held that chapter 143 of the Local Government Code does not explicitly authorize firefighters to bring suit to enforce their rights for compensation under sections 143.115-.116 of the Local Government Code. *Bell*, 221 S.W.3d at 323.

Accordingly, the legislature did not consider these statutes and ordinances to be a written contract for which the waiver under chapter 271 would apply. If an ordinance was a written contract under chapter 271 as the appellate court opines, section 180.006 would be superfluous. Because no waiver applied to the claims under the civil service

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<sup>9</sup> The bill analysis erroneously attributes the *Bell* case to this Court. (App'x Tab 2).

statutes and ordinances for compensation, the legislature provided one for firefighters and police officers.<sup>10</sup>

The court of appeals' holding that an ordinance is a written contract under chapter 271 is clearly against the great weight of authority in this state. Because of the implications for future suits by anyone who acts in compliance with an ordinance, this Court must grant review and hold that municipal ordinances are not written contracts.

### **CONCLUSION AND PRAYER**

The court of appeals' opinion undermines this Court's sovereign immunity jurisprudence in holding an ordinance was a written contract and indicating a statute could be. Instead of applying the rules of construction for waiver of immunity for legislative acts as provided in *Wichita Falls State Hospital v. Taylor*, 106 S.W.3d 692 (Tex. 2003), the court of appeals held that an ordinance was a written contract and used the limited waiver for written contracts in chapter 271 to force Houston to defend breach of contract lawsuits for what was at most an alleged breach of an ordinance. The legislature knew that the issues involved in cases like this one require a legislative waiver that was not part of the contract statute. And the legislature provided one for future claims. The Court should grant the petition and hold that an ordinance is not a contract for purposes of the waiver of immunity under chapter 271.

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<sup>10</sup> However, the legislature chose to make it applicable to claims initially asserted on or after June 15, 2007. The legislature chose not to waive immunity for this case.

Respectfully submitted,

THOMAS P. PERKINS, JR.  
Dallas City Attorney

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Barbara E. Rosenberg  
Texas Bar No. 17267700  
James B. Pinson  
Texas Bar No. 16017700  
Peter Brooke Haskel  
(Texas Bar No. 09198900)  
Charles Estee  
(Texas Bar No. 06673600)  
Assistant City Attorneys

City Attorney's Office  
1500 Marilla Street, Room 7B North  
Dallas, Texas 75201  
Telephone: 214-670-3519  
Telecopier: 214-670-0622

ATTORNEYS FOR AMICUS CURIAE  
CITY OF DALLAS

**CERTIFICATE OF MAILING AND SERVICE**

I hereby certify that the City of Dallas' Amicus Brief was mailed on November 23, 2009, to the following:

Blake A. Hawthorne, Clerk (Original and 12 copies) *Via Federal Express*  
Supreme Court of Texas  
P.O. Box 12248  
Austin, Texas 78711-2248

Arturo Michel, Esq. *Via Regular U. S. Mail*  
City Attorney  
Donald J. Fleming  
Senior Assistant City Attorney  
Timothy Higgley  
Senior City Attorney  
City of Houston Legal Department  
P.O. Box 368  
Houston, Texas 77001-0368  
*Counsel for City of Houston*

Marc A. Young, Esq. *Via Regular U.S. Mail*  
Diane M. Guariglia  
Four Houston Center  
1221 Lamar, 16th Floor  
Houston, 77010  
*Counsel for Respondents*

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Barbara Rosenberg

**APPENDIX**

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HOUSE RESEARCH ORGANIZATION, BILL ANALYSIS,  
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