

CAUSE NO. _____

CITY OF GRAND PRAIRIE,	§	IN THE DISTRICT COURT
<i>Plaintiff,</i>	§	
	§	
v.	§	TRAVIS COUNTY, TEXAS
	§	
THE STATE OF TEXAS,	§	261ST, DISTRICT COURT
<i>Defendants.</i>	§	_____ JUDICIAL DISTRICT

PLAINTIFF’S ORIGINAL PETITION FOR DECLARATORY RELIEF

Plaintiff, the City of Grand Prairie (“Grand Prairie”), files this Original Petition for Declaratory Judgment against Defendant, the State of Texas (“Texas”), challenging Senate Bill 2038 (“SB 2038”). Grand Prairie shows as follows:

I. INTRODUCTION

In 1963, with the adoption of the Municipal Annexation Act—clearly, a legislative act—the Legislature established municipal extraterritorial jurisdictions (“ETJ”). Under the Act, the only mechanism to remove land from a municipality’s ETJ is by written consent of the municipality’s governing body via ordinance or resolution, i.e., via a legislative act of the city council. However, SB 2038, effective September 1, 2023, allows individuals to “opt out” of a city’s ETJ with no notice to nearby property owners, no oversight by any branch of government, and without the requisite legislative consent of the governing body. Put simply, SB 2038 is an unconstitutional delegation of legislative authority to private parties and must be found unconstitutional.

Almost immediately since SB 2038 became effective, cities across the state began receiving petitions for the removal of property from their ETJ. Grand Prairie

has already received four¹ and more are expected. SB 2038 represents an unconstitutional delegation of legislative authority to private parties because it fails the eight-part standard articulated by the Texas Supreme Court.² While delegations of legislative decision-making to private parties are not per se unconstitutional, they are subject to more stringent requirements and accorded less judicial deference.³

Delegations of legislative authority violate the separation of powers doctrine when they are open-ended, permanent, not subject to meaningful review by another branch of government, are made by individuals with a pecuniary interest in the outcome, and affect the rights of third-parties whose interests are not represented in the decision-making process.⁴ Accordingly, because SB 2038's petition process for automatic ETJ removal fails the Texas Supreme Court's test for permissible delegations of legislative authority on every applicable standard, Grand Prairie seeks a declaration that SB 2038 is facially unconstitutional and violates Article II, Section 1 of the Texas Constitution, rendering the entirety of Subchapter D of Chapter 42 of the Local Government Code void.

¹ Two petitions were statutorily complete and have been denied by the City Council pursuant to the express legislative authority provided to cities pursuant to section 42.023 of the Texas Local Government Code, discussed *infra*, which requires the consent of the governing body before its ETJ can be reduced. Tex. Loc. Gov't Code § 42.023. Those two petitions are attached hereto as **Exhibit 1**. Two more petitions have been received as of the date of the filing of this Original Petition but were not presented to the governing body for consideration because they were statutorily deficient. They are attached hereto as **Exhibit 2**. Grand Prairie fully anticipates that these two petitions will be refiled with the required information.

² *FM Properties Operating Co. v. City of Austin*, 22 S.W.3d 868, 873 (Tex. 2000); *Texas Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 466–67 (Tex.1997); *Housing Auth. of Dallas v. Higginbotham*, 135 Tex. 158, 143 S.W.2d 79, 87 (1940).

³ *FM Properties Operating Co.*, 22 S.W.3d at 874.

⁴ *Id.*

Additionally, and alternatively, if necessary, SB 2038’s petition mechanism permits property to be included in a petition request under two scenarios – if it is signed by more than 50 percent of the registered voters of the area to be released, or if it is signed by a “majority in value of the holders of the land... as indicated by the tax rolls” to be released.⁵ Although its purported purpose is to allow property owners to control whether their property is in a city’s ETJ, SB 2038 provides absolutely no mechanism for the 49 percent of registered voters or owners of a “minority in value” to receive *advance* notice that their property is being included in an ETJ release petition or a meaningful opportunity to be heard *prior* to the purportedly automatic removal of their property from a city’s ETJ and object to their release.⁶

Instead, SB 2038 only requires a city to notify residents and landowners subject to a petition of “the *results* of the petition,” and a city can satisfy this requirement simply by notifying the *person who filed the petition*.⁷ Grand Prairie has standing to challenge the constitutionality of SB 2038 under due course of law and equal protection grounds because the automatic removal of property from the City’s regulatory authority causes it to lose its ability to equally enforce its generally applicable police power regulations applicable in its ETJ⁸; therefore, it requests a

⁵ Tex. Loc. Gov’t Code § 42.104(a). SB 2038 defines neither “majority in value,” nor the phrase “as indicated by the tax rolls.” This begs multiple questions—which year’s tax roll must be consulted? Which value controls? Since SB 2038 does not mandate that the most recent taxable value must be used, these are open questions.

⁶ Tex. Loc. Gov’t Code § 42.105. Notably, even if such property owners were given advance notice and an opportunity to be heard, because the removal mechanism purports to be automatic, such participation would be rendered meaningless.

⁷ *Id.*

⁸ Grand Prairie respectfully asks the Court to take judicial notice of its Charter and Code of Ordinances, which it maintains in a publicly available form. See Tex. R. Evid. 204; *Farahnak v. City*

declaratory judgment that would invalidate SB 2038, which would remedy Grand Prairie's injury.⁹ This presents a ripe challenge because once a city receives a removal petition, removal purports to be automatic based only on the passage of time. Accordingly, Grand Prairie seeks a declaration that SB 2038's petition mechanism is unconstitutional because it violates due course of law and equal protection, in violation of Texas Constitution, Article I, Section 19, by preventing cities from equally enforcing generally applicable ETJ regulations against similarly situated properties in the ETJ, which have not requested to be released and for which the governing body's consent for removal was not granted.

Additionally, and alternatively, if necessary, SB 2038 (section 42.105) irreconcilably conflicts with section 42.023 in that the aforementioned provisions may not be harmonized and are *in pari materia*.¹⁰ Therefore, because section 42.023 is the more specific provision requiring the consent of the governing body before ETJ may be reduced compared to the more general removal "by operation of law," Grand Prairie seeks a declaration that section 42.023 as the more specific statute prevails over the more general section 42.105.

of Southlake Bd. of Adjustment, No. 02-21-00202-CV, 2022 WL 405899, at *1 (Tex. App.—Fort Worth Feb. 10, 2022, pet. denied) (taking judicial notice of code of ordinances maintained on the internet). https://library.municode.com/tx/grand_prairie/codes/code_of_ordinances

⁹ See *Wilson v. Andrews*, 10 S.W.3d 663, 669 (Tex. 1999) (cities have standing to assert declaratory claims based on due course and equal protection violations where they have alleged concrete injuries and have asked for a remedy that, if granted, would end the controversy); *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444-46 (Tex. 1993) (discussing standing requirements under Texas Constitution as set forth in TEX. CONST. art. 1, § 13).

¹⁰ See *Goldstein v. State*, 803 S.W.2d 777, 788 (Tex. App.—Dallas 1991, pet. ref'd) (discussing elements of *in pari materia*).

Additionally, and strictly in the alternative, if necessary, in the unlikely event that the court determines the two aforementioned provisions can be harmonized, Grand Prairie seeks the following declaration. SB 2038 purports to impose an automatic duty on a city to release property from its ETJ if it receives a petition from a property owner; however, Chapter 42 of the Texas Local Government Code *also* provides that a city's ETJ may not be reduced without the consent of the governing body.¹¹ Had the Legislature intended to remove the requirement that the governing body's discretionary consent was required before a city's ETJ is reduced, it would have said so. Since it did not, the only way to harmonize SB 2038 with section 42.023 is by finding that ETJ is removed by operation of law *only* if the governing body first gives its discretionary consent for the reduction in ETJ. Without such discretionary consent, a petition for ETJ removal is necessarily ineffective and cannot proceed "by operation of law" because the law prohibits it. Accordingly, arguing strictly in the alternative in the unlikely event that the court finds the statutes in question can be harmonized, Grand Prairie seeks a declaration that SB 2038 and section 42.023 of the Local Government Code can *only* be harmonized by finding that ETJ is removed by operation of law only if the governing body first gives its written consent for the reduction in ETJ in accordance with section 42.023 of the Local Government Code.

Additionally, and alternatively, if necessary, because SB 2038 allows individual landowners to force cities to conduct elections to remove the landowner's own property from a city's ETJ where residents of the ETJ are the only ones eligible

¹¹ Tex. Loc. Gov't Code Ann. § 42.023.

to vote for release, Subchapter E of Chapter 42 of the Local Government Code suffers from the same unconstitutional delegation problems as Subchapter D for the reasons previously stated, in violation of Texas Constitution Article II, Section 1.¹² In addition, SB 2038 only permits property owners who reside in the ETJ to vote on its status. In addition to being an unconstitutional delegation of legislative authority, this also violates the Texas Constitution's guarantee of equal protection, in violation of Article I, Section 3. Accordingly, Grand Prairie seeks a declaration that SB 2038 is unconstitutional in its entirety.

Additionally, and alternatively, if necessary, SB 2038 contains no severability clause; If all provisions in a statute are essentially and inseparably connected in substance, like in SB 2038, then severance of part of the statute based on its constitutional infirmity is not proper and the entire statute fails. *See Rose v. Doctors Hosp.*, 801 S.W.2d 841, 844 (Tex. 1990); *Horizon/ CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 902 (Tex. 2000). The Court should invalidate the entirety of SB 2038. *National Federation of the Blind of Texas, Inc. v. Abbott*, 647 F.3d 202 (5th Cir. 2011) (applying Texas law).

¹² Tex. Loc. Gov't Code §§ 42.151 – 42.156.

II. PARTIES AND SERVICE OF PROCESS

The City of Grand Prairie, Texas is a home rule municipality.¹³

Defendant, the State of Texas, may be served with process through the Texas Secretary of State, 1019 Brazos Street, Austin, TX 78701.

III. DISCOVERY CONTROL PLAN

Pursuant to Rule 190.4 of the Texas Rules of Civil Procedure, Grand Prairie intends that discovery, if any, be conducted under Level 3.

IV. JURISDICTION AND VENUE

This Court has jurisdiction over the State of Texas because it is domiciled in and does business in Travis County, Texas and/or resides and has its principal place of business in Texas. The subject matter in controversy is within the jurisdictional limits of this Court, and the Court has jurisdiction over this action pursuant to article V, section 8, of the Texas Constitution and Section 24.007 of the Texas Government Code, as well as the Texas Uniform Declaratory Judgments Act (“UDJA”), Tex. Civ. Prac. & Rem. Code § 37.001, et seq.

Under Texas Rule of Civil Procedure 47(c)(5), Grand Prairie seeks non-monetary declaratory and injunctive relief.

Venue is proper in the District Court of Travis County, Texas because the State of Texas is a party to this lawsuit that seeks to declare a state law unconstitutional, void, and unenforceable, Tex. Civ. Prac. & Rem. Code § 15.014, and because all or a

¹³ In accordance with Texas Local Government Code § 9.008(b), Grand Prairie asks this Court to take judicial notice of the provisions of its published Charter, and status thereunder as a Texas home rule city.

substantial part of the events or omissions giving rise to the claims presented herein occurred in Travis County, Texas. Tex. Civ. Prac. & Rem. Code § 15.002(a)(1). The Texas Attorney General has been served with a copy of this lawsuit contemporaneous with the filing of this lawsuit. See Tex. Civ. Prac. & Rem. Code § 37.006(b).

V. STANDING, WAIVER OF IMMUNITY, AND RIPENESS

Grand Prairie has a present, justiciable interest in challenging the constitutionality of SB 2038 because as of the filing of this lawsuit, it has received four separate petitions (and counting) for release from the City's ETJ.¹⁴ Pursuant to the express terms of SB 2038, property-owner petitioners possess the unilateral right to force the removal of land from Grand Prairie's ETJ, which purports to occur by operation of law if the City takes no action to approve each petition, notwithstanding the fact that a city's ETJ cannot be reduced without the consent of the governing body.¹⁵ The mere filing of these petitions with the City purports to trigger the inevitable removal of these properties from Grand Prairie's ETJ based on nothing more than the passage of time.¹⁶ This constitutes tangible, imminent harm to the City of Grand Prairie and other Texas cities that have also received petitions for ETJ release.

Grand Prairie's interest in protecting the health, safety and welfare of all persons residing in and adjacent to its borders, and also in equally enforcing its

¹⁴ See Exhibits 1 and 2.

¹⁵ Tex. Loc. Gov't Code § 42.023.

¹⁶ Tex. Loc. Gov't Code § 42.105.

generally applicable laws that apply to all property within its ETJ,¹⁷ provides it with a sufficient stake in the controversy (i.e., standing) to assure the presence of an actual controversy that the declaration sought will resolve.¹⁸ Grand Prairie's interest in the declarations it seeks is not theoretical. On October 10, 2023, the Grand Prairie City Council at a duly called meeting exercised its statutorily authorized legislative discretion¹⁹ and denied the two statutorily compliant petitions it has received.

Because Grand Prairie has received (and expects to continue to receive) petitions for the release of property from its ETJ and has acted pursuant to its statutory authority to deny the requested releases, there is a real and present controversy between the parties, which will be determined by the judicial declarations sought.²⁰ Under this standard, Grand Prairie has standing to assert the claims raised herein.²¹

Undeniably, the clock on SB 2038 is already ticking, not just because of the conflict between it and existing law, but because it unconstitutionally delegates legislative authority to individuals and under the terms of SB 2038 irreversibly removes this discretionary legislative decision from the City. There is a substantial

¹⁷ Tex. Loc. Gov't Code § 42.001.

¹⁸ See *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993) (discussing standing in UDJA context).

¹⁹ Tex. Loc. Gov't Code § 42.023.

²⁰ See *Sw. Elec. Power Co. v. Lynch*, 595 S.W.3d 678, 685 (Tex. 2020) (describing ripeness in the UDJA context).

²¹ See *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 77 (Tex. 2015) (describing standing doctrine in context of challenge of state statutes).

likelihood that the requested declaratory relief sought will remedy the alleged injury suffered by Grand Prairie (and other Texas cities) caused by SB 2038.²²

Texas' immunity is clearly and unambiguously waived in this declaratory judgment action challenging the constitutionality of SB 2038.²³

VI. FACTUAL BACKGROUND AND LEGAL LANDSCAPE OF ETJs

In 1963, the Texas Legislature enacted the Municipal Annexation Act, Tex. Rev. Civ. Stat. Ann. art. 970a.²⁴ In addition to regulating annexation, the Municipal Annexation Act established the concept of ETJ in Texas. The Act created a tiered system of ETJ for cities and towns of various populations and authorized the exercise of certain powers by cities and towns in their newly created ETJ.²⁵ But the Act is not the first instance of the Legislature granting cities the power to act beyond their borders. The Legislature granted cities the legislative authority to exercise extraterritorial power at least since 1913 to control nuisances, for example.²⁶

The Legislature established municipal ETJ (i.e., the “unincorporated area that is contiguous to the corporate boundaries” of a city)²⁷ “to promote and protect the general health, safety, and welfare of persons residing in and adjacent to” cities and

²² See *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 485 (Tex. 2018) (discussing standing and redressability).

²³ See Tex. Civ. Prac. & Rem. Code § 37.006(b); *Tex. Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 622 (Tex. 2011).

²⁴ Act of March 25, 1963, 58th Leg., R.S., ch. 160, 1963 Tex. Gen. Laws 447 (codified Act of 1987, 70th Leg., R.S., ch. 149 § 1, 1987 Tex. Gen. Laws 707, 741). The Act was not substantially changed in either the 1987 codification or 1999 recodification.

²⁵ Tex. Rev. Civ. Stat. art. 970a. (now Tex. Loc. Gov't Code § 42.021).

²⁶ See Act of April 7, 1913, 33d Leg., R.S., ch. 147, § 4, 1913 Tex. Gen. Laws 307, 310 (“That each city shall have the power to define all nuisances and prohibit the same within the city *and outside the city limits for a distance of five thousand feet*; to have the power to police all parks or grounds, speedways, or boulevards owned by said city and lying outside of said city”) (emphasis supplied).

²⁷ Tex. Loc. Gov't Code § 42.021.

provide a buffer zone outside of a city’s corporate limits in which cities could exercise limited, discretionary legislative authority.²⁸ An ETJ is a statutory creation of the Texas Legislature and a city’s authority to regulate within it is wholly derived from that “*legislative grant of authority.*”²⁹

SB 2038, which became effective on September 1, 2023, amended Chapter 42 of the Local Government Code by adding Subchapter D, which provides, in pertinent part, that upon being presented with a valid petition for release from a city’s extraterritorial jurisdiction (“ETJ”) by “more than 50 percent of the registered voters of an area” or “a majority in value of the holders of title of land in an area,” a city must release the land from its ETJ, or it will be automatically released by operation of law. Tex. Loc. Gov’t Code Ann., §§42.101 – 42.105.³⁰

A. Establishment and Exercise of Extraterritorial Authority is Constitutional.

The question of whether a city may lawfully possess the power to act beyond its borders is not a new one. In 1978, the United States Supreme Court upheld the constitutionality of municipal extraterritorial regulatory authority as a rational legislative response to problems faced by cities.³¹ While the stated rationale for SB 2038 was to protect property owners who allegedly “have no vote or voice in the

²⁸ Tex. Loc. Gov’t Code § 42.001.

²⁹ *Town of Annetta S. v. Seadrift Dev., L.P.*, 446 S.W.3d 823, 826 (Tex. App.—Fort Worth 2014, pets. denied) (quoting *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 902 (Tex. 2000) (Abbott, J., dissenting)) (emphasis supplied).

³⁰ SB 2038 also added a new Subchapter E, which provides the same relief (i.e., ETJ removal). Tex. Loc. Gov’t Code Ann. §§ 42.151 – 42.156. Upon being presented with a petition signed by at least five percent of the registered voters residing in the area to be released, a city must call an election on the next uniform election date. Tex. Loc. Gov’t Code Ann., § 42.153. Upon a successful election to remove property from the ETJ, if the city does not act to remove the property, it is removed by operation of law. Tex. Loc. Gov’t Code Ann., § 42.155(b).

³¹ *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978).

municipalities that regulate them,”³² Chief Justice Rehnquist succinctly framed the policy rationale for ETJ authority in a way that is more relevant today than it was in 1978:

The [state legislature] could have decided that municipal corporations should have some measure of control over activities carried on just beyond their “city limit” signs, particularly since today’s police jurisdiction may be tomorrow’s annexation to the city proper. Nor need the city’s interests have been the only concern of the legislature when it enacted the police jurisdiction statutes. Urbanization of any area brings with it a number of individuals who long both for the quiet of suburban or country living and for the career opportunities offered by the city’s working environment. Unincorporated communities...dot the rim of most major population centers...and state legislatures have a legitimate interest in seeing that this substantial segment of the population does not go without basic municipal services such as police, fire, and health protection. Established cities are experienced in the delivery of such services, and the incremental cost of extending the city’s responsibility in these areas to surrounding environs may be substantially less than the expense of establishing wholly new service organizations in each community.³³

In rejecting both equal protection and due process challenges to a city’s exercise of extraterritorial authority, the Supreme Court held that such authority is a “rational legislative response to the problems faced by [Alabama’s] burgeoning cities.”³⁴ Texas has adopted a similar rationale and numerous Texas courts, including the Austin Court of Appeals, have repeatedly acknowledged that cities may lawfully exercise statutory grants of authority within their ETJ.³⁵

³² House Committee Report, Bill Analysis, S.B. 2038, By: Bettencourt, Land & Resource Management Committee Report, which may be found at <https://capitol.texas.gov/tlodocs/88R/analysis/pdf/SB02038H.pdf#navpanes=0>. Grand Prairie asks the Court to take judicial notice of the House Committee Report.

³³ *Holt Civic Club*, 439 U.S. at 74.

³⁴ *Id.* at 75.

³⁵ See *Sw. Travis Cnty. Water Dist. v. City of Austin*, 64 S.W.3d 25, 32 (Tex. App.—Austin 2000, pet. withdrawn) (acknowledging applicability of consent requirement for reduction of ETJ); *City of*

Fast forward to 2023 and the problems faced by Texas' burgeoning cities likely eclipse anything faced by Alabama cities in the 1970's, rendering the Court's rationale for upholding the constitutionality of municipal extraterritorial authority sound.

Despite the contention that municipal regulatory authority in the ETJ runs rampant, it is undeniable that the Legislature has granted cities relatively limited power to address health, safety, welfare, and moral issues in the ETJ. The following state laws authorize cities to exercise authority in the ETJ:

- Health & Safety Code § 713.009 – Cemeteries
- Local Government Code § 212.003(a) – Subdivision and Platting Regulations
- Local Government Code §§ 216.003, 216.902 – Signs
- Local Government Code § 217.042 – Nuisances within 5,000 feet (home rule city only)
- Local Government Code § 341.903 – Policing City-Owned Property (home rule city only)
- Local Government Code § 552.001 – Utility System
- Water Code § 26.177 – Pollution Control and Abatement
- Local Government Code Chapter 43 – Annexation (by consent only)

On the other hand, the power most closely associated with municipal regulatory authority—zoning—may not be applied in the ETJ.³⁶ State law also prohibits a city from regulating the following in the ETJ: (1) the use of a building or property for business, industrial, residential, or other purposes; (2) the bulk, height, or number of buildings constructed on a tract of land; (3) the size of a building that

Austin v. Jamail, 662 S.W.2d 779, 783 (Tex. App.—Austin 1983, writ dismissed) (acknowledging applicability of Water Code provisions in ETJ); *City of Shoreacres v. State*, 582 S.W.2d 211, 214 (Tex. App.—Houston [1st Dist.] 1979, writ refused n.r.e.) (holding that release of ETJ is exclusively within a city's legislative discretion).

³⁶ *Seadrift Dev., L.P.*, 446 S.W.3d at 827.

can be constructed on a tract of land; (4) the number of residential units that can be built per acre of land; and (5) the size, type, or method of construction of a water or wastewater facility that can be constructed to serve a developed tract in certain circumstances.³⁷

B. Authority to Regulate ETJ is Legislative in Nature.

Though a city's ability to regulate within its ETJ is limited, the Texas Legislature nonetheless has granted the governing bodies of cities the authority to make certain discretionary *legislative* decisions that affect land within the ETJ.³⁸ Under both federal and state law, acts are legislative if they have the purpose and effect of altering the legal rights, duties and relations of third-parties.³⁹ Under SB 2038, a petition to remove property from the ETJ is necessarily legislative in nature.⁴⁰

For example, under the federal definition of what constitutes a legislative act, the decision to remove property from a city's ETJ is plainly legislative in nature. SB 2038's petition procedure permits a single landowner of any size property to file a petition with a city for removal from the ETJ, which then occurs automatically following the passage of the requisite time.⁴¹

³⁷ *Id.*

³⁸ *Elliott v. City of Coll. Station*, No. 06-22-00078-CV, 2023 WL 5617344, at *11 (Tex. App.—Texarkana Aug. 31, 2023, no pet. h.).

³⁹ *Jarkesy v. Sec. & Exch. Comm'n*, 34 F.4th 446, 461 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 2688 (2023) and *cert. denied*, 143 S. Ct. 2690 (2023) (citing *INS v. Chadha*, 462 U.S. 919, 952, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983)) (“Government actions are ‘legislative’ if they have ‘the purpose and effect of altering the legal rights, duties and relations of persons ... outside the legislative branch.’”); see also *Humphrey v. Balli*, 61 S.W.3d 519, 523 (Tex. App.—San Antonio 2001, no pet.) (act is legislative if it of a general or permanent character and sets conduct or policy of citizens).

⁴⁰ See *City of Shoreacres*, 582 S.W.2d at 214 (holding that release of ETJ is exclusively within a city's *legislative* discretion) (emphasis supplied).

⁴¹ Tex. Loc. Gov't Code § 42.105.

The effect of SB 2038 is apparent. Once the property in question is released, all ETJ regulations the city previously adopted that apply to the property are effectively nullified (while those same regulations would still apply to neighboring property not subject to the petition) and future ETJ regulations would be of no force and effect. Indeed, the stated purpose and effect of SB 2038 is to explicitly permit the petitioning party to alter its own legal rights and relations vis a vis a city's ETJ.⁴²

But SB 2038 does not stop there. It not only permits a petitioner to alter its own rights, but it also permits a petitioner to alter the rights of other landowners who may not even want to be removed from a city's ETJ and affords them absolutely no prior notice or meaningful opportunity to be heard before removal is automatically effectuated.⁴³

C. SB 2038 is an Unconstitutional Delegation of Legislative Authority.

Under Article II, Section 1 of the Texas Constitution, the three branches of Texas government are separate and “no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.”

When delegating authority, the Legislature must provide standards that are “reasonably clear and hence acceptable as a standard of measurement.”⁴⁴ The Legislature need not detail every rule for implementing that authority, but when it

⁴² House Committee Report, Bill Analysis, S.B. 2038, By: Bettencourt, Land & Resource Management Committee Report, which may be found at <https://capitol.texas.gov/tlodocs/88R/analysis/pdf/SB02038H.pdf#navpanes=0>.

⁴³ Tex. Loc. Gov'y Code §§ 42.102, 42.105.

⁴⁴ *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 741 (Tex. 1995).

delegates legislative authority to a private party, courts must *carefully review* such acts to ensure that the public interest is served.⁴⁵

Plainly, the Texas Constitution vests legislative power in the Legislature.⁴⁶ However, it is equally well established that “in a complex society like ours, delegation of legislative power is both necessary and proper in certain circumstances.”⁴⁷

The Legislature may delegate legislative power to local governments, administrative agencies and even private entities under certain conditions. Legislative powers may be delegated as long as the Legislature also establishes reasonable standards to guide the delegee in the exercise of those powers.⁴⁸ Unlike delegations to other governmental entities, delegations to private entities “raise more troubling constitutional issues than public delegations” and are, therefore, “subject to *more stringent requirements and less judicial deference* than public delegations.”⁴⁹

Although private delegations are analyzed under eight factors:

1. Are the private delegate's actions subject to meaningful review by a state agency or other branch of state government?
2. Are the persons affected by the private delegate's actions adequately represented in the decision-making process?
3. Is the private delegate's power limited to making rules, or does the delegate also apply the law to particular individuals?
4. Does the private delegate have a pecuniary or other personal interest that may conflict with its public function?
5. Is the private delegate empowered to define criminal acts or impose criminal sanctions?
6. Is the delegation narrow in duration, extent, and subject matter?
7. Does the private delegate possess special qualifications or training for the task delegated to it?

⁴⁵ *Id.*

⁴⁶ *FM Properties* at 873.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* (emphasis added).

8. Has the Legislature provided sufficient standards to guide the private delegate in its work?⁵⁰

It is axiomatic that the Legislature can revoke a power it had the authority to grant in the first place; however, within the context of SB 2038, it is not the *Legislature* revoking ETJ status on a parcel-by-parcel basis. Rather, the petition provision of SB 2038 vests that exclusive authority to determine whether a parcel will stay in the ETJ or not in interested *individual landowners*. And not only may individual landowners unilaterally revoke their own ETJ status, SB 2038 allows them to revoke it for “minority” landowners—either by value or by number of registered voters.

Considering each factor in turn, it is clear that the petition mechanism violates the standards for delegations of legislative authority to private parties:

- SB 2038’s petition provision provides no meaningful review by any branch of government – it is self-effective merely by filing a petition.
- SB 2038’s petition provision allows “majority” landowners to force the release of “minority” landowners from a city’s ETJ without their input, agreement or even knowledge.
- SB 2038’s petition provision allows individual landowners to effectively void ETJ regulations not only on their property but on surrounding “minority” properties.
- SB 2038 is specifically designed to reward those with the most pecuniary interest to determine whether land remains within a city’s ETJ, thereby affecting the rights and status of other landowners without their consent or knowledge.
- SB 2038’s petition provision to remove property from the ETJ is permanent and broad.
- SB 2038’s only requirement to invoke its petition process is that a party own land or reside in the ETJ, without regard to whether removal of a parcel or parcels is in the public interest.
- SB 2038’s petition provision provides no standards for ETJ removal—the process is automatic.

⁵⁰ *Id.* at 874.

In SB 2038, the Legislature adopted no standards for any party other than the interested landowner petitioner to determine whether removal of a particular piece of land from a city’s ETJ serves the public interest that ETJs were legislatively created to serve.⁵¹ Because it unconstitutionally delegates to the individual property owners the right to determine whether “certain [adjacent] areas” that would otherwise be in a city’s ETJ are worthy of protection of the “general health, safety, and welfare,” SB 2038 results in an unconstitutional delegation of legislative authority to private parties, in violation of article 2, section 1 of the Texas Constitution.⁵²

D. SB 2038 Allows for Involuntary Removal from the ETJ

SB 2038 is premised on the idea that it provides a voice to property owners who wish to be removed from a city’s ETJ.⁵³ Although allowing a single petitioner to remove *their own* property is an unconstitutional delegation of legislative authority, SB 2038 purports to allow a petitioner to automatically remove *other* properties from a city’s ETJ without their consent or knowledge. This alteration of the rights of third-parties without affording them any advance notice or a meaningful opportunity to be heard is unprecedented in Texas law.

⁵¹ Tex. Loc. Gov’t Code Ann, § 42.001.

⁵² *FM Properties* at 873.

⁵³ House Committee Report, Bill Analysis, S.B. 2038, By: Bettencourt, Land & Resource Management Committee Report, which may be found at <https://capitol.texas.gov/tlodocs/88R/analysis/pdf/SB02038H.pdf#navpanes=0>.

Consider section 42.102(b) of SB 2038, which provides that the owners of a “majority in value”⁵⁴ of an area consisting of one or more parcels may file a petition for *multiple* parcels and trigger mandatory release of *all* parcels subject to the petition.⁵⁵ Even if the owners of a “minority in value” (whatever that means and however it is calculated) wish to stay within the city’s ETJ, SB 2038 affords them *no notice* prior to removal and affords them *no meaningful opportunity to be heard* before their property is automatically removed from the ETJ 45 days after the petition is filed.

The same is true for the 49% of registered voters of an area described by a petition.⁵⁶ They may not even know that a petition to remove their property from a city’s ETJ is being filed with the city because SB 2038 provides no mechanism to provide them with notice or the chance to object.

In either event, such petitions could have incredibly far-reaching effects. For example, what if property owners in the “minority in value” or 49% of registered voters groups are parties to a development agreement with the city in question?⁵⁷ Development agreements pursuant to Chapter 212 of the Local Government Code

⁵⁴ SB 2038 provides no guidance for determining how a “majority in value” is calculated. Certainly, the term majority is easy to define, being anything over 50%, but as any court knows, determining property value is typically an exercise in competing experts (or the opinions of the owner of property). Moreover, while courts are prohibited from passing on the wisdom of laws, they are not prohibited from passing on laws that are hopelessly vague. For instance, how is a city to resolve a petition presented by a property owner who claims that they are the owner of a “majority in value” of the parcels in question, but receives notice from another property owner that their parcel is, in fact, the “majority in value” and they do not petition for ETJ removal? SB 2038 provides no mechanism for the City to resolve such disputes, but purports to require ETJ release. Are the parcels released if the property owners dispute over who owns a “majority in value,” or is the only remedy judicial?

⁵⁵ Tex. Loc. Gov’t Code § 42.102(b).

⁵⁶ Tex. Loc. Gov’t Code § 42.104(a)(1).

⁵⁷ Tex. Loc. Gov’t Code § 212.172.

may only be made with landowners located in the ETJ of a city.⁵⁸ They establish land use standards and provide for infrastructure, and guarantee the continuation of ETJ status for a specified period of time up to 45 years and provide for annexation upon the expiration of a time frame.⁵⁹

If a “minority” landowner is subject to a removal petition about which they might not even know, SB 2038 threatens to not only divest the property owner of enforceable property rights, but also the city with whom the landowner has contracted by potentially involuntarily removing the property from the city’s ETJ. Moreover, depending on the configuration of the land in question, removing a specific parcel from the ETJ could render other parcels still in the ETJ legally ineligible for annexation into the city because these other parcels are no longer “adjacent.”⁶⁰

The very real prospect that SB 2038 could invalidate Chapter 212 development agreements across the state cannot be ignored. Chapter 212 development agreements are prevalent across the state. Many property owners and developers have entered into section 212.172 development agreements. Section 212.172 development agreements are powerful real estate instruments. They bind the city and landowner for 45 years, are recorded in the deed records of the county, are covenants that run with the land, and constitute a permit for vested rights purposes.⁶¹ Moreover, because

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See *City of Waco v. City of McGregor*, 523 S.W.2d 649, 653 (Tex. 1975) (explaining “adjacent” is usually understood to mean “neighboring or close by” or “in the vicinity of and not necessarily contiguous or touching upon”; adjacency is a question of law); *City of Irving v. Callaway*, 363 S.W.2d 832, 836 (Tex. App.—Dallas 1962, writ ref’d n.r.e.) (explaining a gap of six miles is not “adjacent”).

⁶¹ Tex. Loc. Gov’t Code § 212.172(f), (g), (h).

the Legislature made Chapter 212 development agreement protections retroactive,⁶² the legal status of an untold number of such agreements could be upended by removal petitions filed by landowners who are strangers to these 212.172 development agreements.

An even more grim prospect for cities is if parties to development agreements decide to remove their property from the city's ETJ. If a city has entered a 212.172 development agreement wherein it has agreed to provide streets, water, sewer and other infrastructure for land based upon the promise that the property will be annexed into the city to expand its tax base, can SB 2038 be used to allow developers to get the benefit of infrastructure improvements costing the city millions of dollars while denying a city the ability to annex the property in the future? This practice contravenes the letter and spirit of 212.172 development agreements. The declarations sought by Grand Prairie will resolve this issue.

E. SB 2038 and Section 42.023 Cannot be Harmonized, and Section 42.023 Controls.

Section 42.023 of the Local Government Code requires a governing body to exercise its legislative discretion before a city's ETJ can be reduced. SB 2038 purports to make ETJ removal mandatory upon the filing of a compliant petition and the passage of time. Because these provisions cannot be reconciled, courts apply the rules of statutory construction to such situations—the specific provision will ordinarily

⁶² *Id.*

prevail unless the general provision is the later enactment and the manifest intent is that the general provision prevail.⁶³

Had the Legislature manifestly intended for SB 2038 to prevail over section 42.023, it could have either amended that section to so reflect that manifest intent or it could have otherwise made its intent clear in SB 2038 itself. It did neither. Whether that was the result of oversight or some other cause is immaterial. The job of the courts is to construe statutes, not rewrite them for the Legislature.

Accordingly, if these statutes cannot be harmonized (a question of law), then section 42.023 must prevail as the more specific enactment because it requires the exercise of legislative discretion that has been committed to the governing body, except under specific exceptions. SB 2038, on the other hand, contains only a general process for the removal of properties from a city's ETJ, which occurs by a general operation of law standard if the city does not approve the release.

F. Alternatively, if SB 2038's Conflict With A More Specific Existing Law Can Be Harmonized, Section 42.023 Controls.

Arguing strictly in the alternative in the unlikely event that the Court determines SB 2038 and section 42.023 can be harmonized, section 42.023 should control.

When deciding whether overlapping provisions of two different statutes can concurrently operate, courts will construe the different provisions in a way that harmonizes rather than conflicts, if possible.⁶⁴ When the provisions are

⁶³ *Harris Cnty. Appraisal Dist. v. Tex. Workforce Comm'n*, 519 S.W.3d 113, 122 (Tex. 2017).

⁶⁴ *In re Mem'l Hermann Hosp. Sys.*, 464 S.W.3d 686, 716 (Tex. 2015).

irreconcilable, the general rule is that the terms of the later-enacted statute should control.⁶⁵ On the other hand, conflicts between general and specific provisions favor the specific, and when the literal terms of the two provisions cannot both be true, the terms of the specific provision ordinarily will prevail.⁶⁶ Courts should construe the general provision as controlling only when the legislature's manifest intent is for the general provision to prevail and the general provision is the later-enacted statute.⁶⁷

SB 2038, the later enacted statute, conflicts with section 42.023 of the Local Government Code, which provides that a city's ETJ may not be reduced without the governing body's consent. Plainly, a petition to remove property from a city's ETJ constitutes a reduction of a city's ETJ. So how can these provisions be harmonized?

The ubiquitous legal phrase, "by operation of law" is "the means by which a right or a liability is created for a party regardless of the party's actual intent."⁶⁸ As opposed to rights or liabilities that arise following the exercise of discretion, consequences or events that occur by operation of law are automatic with no further action required in order to be effectuated.⁶⁹

SB 2038 provides that a petition for removal is approved by operation of law following a city's failure to approve it and the passage of a short period time.⁷⁰ But because the Legislature also requires parties to obtain the governing body's consent

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *In re Ramires*, No. 12-21-00058-CR, 2021 WL 3265546, at *1 (Tex. App.—Tyler July 30, 2021, no pet.) (citing Black's Law Dictionary (10th ed. 2014)); *see also N. Burnet Gun Store, LLC v. Tack , Tr. of Harvey Donald Testamentary Family Tr.*, 604 S.W.3d 587, 589 (Tex. App.—Austin 2020, no pet.).

⁶⁹ *Id.*

⁷⁰ Tex. Loc. Gov't Code § 42.105(d).

before a city’s ETJ can be reduced, a city’s affirmative act of exercising its legislative discretion and denying a petition is not a “failure to act”—it is the opposite.⁷¹ Therefore, if a city simply fails to take action, then under the terms of SB 2038, the petition is effectuated by operation of law. But if the city affirmatively exercises its discretionary legislative authority and denies the petition, as it is also authorized to do by Chapter 42, then it has not failed to act and the petition cannot be granted by operation of law. Thus, if it is possible to harmonize the conflict between SB 2038 and Local Government Code section 42.023, this is the only way in which both provisions can operate in harmony.

G. Because the Election Mechanism of SB 2038 Suffers from Similar Unconstitutional Delegation Problems, it too must be Voided.

SB 2038 provides for an election mechanism to remove property from the ETJ. At its broadest, it permits as little as five percent (5%) of the registered voters of a city’s ETJ to require a municipal election that, if successful, could “remove” as much as a city’s entire ETJ, and the only individuals permitted to vote in the election are those residing in the ETJ.⁷² SB 2038 provides no upper or lower limits on the amount of land that can be subject to such an election and sets an unusually low petition threshold to compel an election to be held.

Thus, SB 2038 establishes the functional equivalent of referendum to repeal not only a city’s ETJ regulations in the area in question, but it also permits the functional equivalent of a local “repeal” of Subchapters A, B and C of Chapter 42 of

⁷¹ *In re Ramires*, 2021 WL 3265546 at *1.

⁷² Tex. Loc. Gov’t Code § 42.152(a).

the Texas Local Government Code to the ETJ in question. Such a mechanism suffers from its own constitutional problems.

First, SB 2038’s election mechanism constitutes a void local and/or special law in violation of article III, section 56 of the Texas Constitution.⁷³ A successful election to remove property from a city’s ETJ is the functional equivalent of invalidating or voiding all police power regulatory enactments adopted by a city that apply to the property in question, but only voters in the ETJ may participate in the election.⁷⁴ Such an election is not a true popular election because suffrage is strictly limited to residents of a city’s ETJ at the time the election is called.⁷⁵

Second, notwithstanding the inclusion of what amounts to a referendum provision, SB 2038 still runs afoul of the private delegation prohibition that afflicts the petition provision. The delegation at issue in *Boll Weevil* also provided for a referendum, which was required to pass before an “eradication zone” could be established, but the Texas Supreme Court nonetheless found that the delegation was unconstitutional because it was of a permanent nature and provided no standards to guide the delegation.⁷⁶

The delegation at issue in *FM Properties* is even more applicable and provides additional guidance for holding that SB 2038 is an unconstitutional delegation. In *FM Properties*, a provision of the Water Code gave certain landowners in a city’s ETJ

⁷³ Tex. Const. art. III, § 56; see *Maple Run at Austin Mun. Util. Dist. v. Monaghan*, 931 S.W.2d 941, 945 (Tex. 1996) (purpose of section 56 is to secure uniformity of law throughout state).

⁷⁴ Tex. Loc. Gov’t Code § 42.153(b).

⁷⁵ *Texas Boll Weevil Eradication Foundation*, 952 S.W.2d at 470.

⁷⁶ *Id.* at 472.

the power to exempt themselves from the enforcement of certain municipal ETJ regulations related to water quality.⁷⁷ As the Supreme Court noted, one of the central concerns with private delegations, including those in the form of referenda, is the conflict with “democratic rule under a republican form of government,” and whether those taking part in a referendum to remove municipal regulatory oversight in the ETJ are acting in the public interest or in their own pecuniary interest.⁷⁸

Here, SB 2038 is even broader. It not only would allow interested landowners to vote to effectively invalidate water quality standards applicable in the ETJ or a portion thereof, but also every other exercise of police power for the public good. Unlike the unconstitutional delegation at issue in *FM Properties*, which *did not* give landowners authoritative power over the private property of others,⁷⁹ SB 2038 expressly *does* give some landowners authoritative power over the private property of others. As the Court noted, the power of landowners to exempt themselves from water quality standards in the ETJ (which would be only *part* of the effect of SB 2038) can adversely affect the public interest and the interests of downstream water users and the landowners’ neighbors who may prefer to stay in the ETJ.⁸⁰

H. Because of the Invalidity of SB 2038’s Subchapter D, Its Remaining Provisions Are Void and Unenforceable Under Tex. Gov’t Code § 311.032(c) Because, Without a Severability Clause, They Cannot Be Given Effect Without the Invalid Provisions or Application.

⁷⁷ *FM Properties Operating Co.*, 22 S.W.3d at 875.

⁷⁸ *Id.* at 876-77.

⁷⁹ *Id.* at 879.

⁸⁰ *Id.*

If all provisions in a statute are essentially and inseparably connected in substance, like in SB 2038, then severance of part of the statute based on its constitutional infirmity is not proper and the entire statute fails. *See Rose v. Doctors Hosp.*, 801 S.W.2d 841, 844 (Tex. 1990); *Horizon/ CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 902 (Tex. 2000). Here, SB 2038 does not contain a severability clause. This is significant. Under Tex. Gov't Code § 311.032(c), if any provision of a statute, like SB 2038, does not contain a provision for severability or non-severability “[i]s held invalid, the invalidity does not affect other provisions or applications of the statute that can be given effect without the invalid provision or application, and to this end the provisions of the statute are severable.” Under this rule, no provisions of SB 2038 can survive. When the unconstitutional portion of a statute is struck, if that which remains is incomplete and dependent on the unconstitutional portion, it is not severable. The Court should invalidate the entirety of SB 2038. *National Federation of the Blind of Texas, Inc. v. Abbott*, 647 F.3d 202 (5th Cir. 2011) (applying Texas law).

When the Court finds that Section 1 of SB 2038 is unconstitutional, it will basically create a large hole in the statute in a way that creates legislation that the Legislature would have never agreed to or passed. *See Murphy v. NCAA*, 138 S. Ct. 1461, 1482 (2018) (“[Courts] cannot rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole.” (quoting *R.R. Ret. Bd. v. Alton R.R.*, 295 U.S. 330, 362, 55 S.Ct. 758, 79 L.Ed. 1468 (1935))). The U.S. Supreme Court recently addressed severability in *Murphy v. NCAA*, 584 U.S.—, 138 S. Ct. 1461, 200 L.Ed.2d 854 (2018), There, the Court held that the entirety of the

Professional and Amateur Sports Protection Act was unconstitutional because one of its provisions—authorizing private sports gambling—violated the anti-commandeering doctrine. *Id.* at 1484. Justice Alito's majority opinion separately explored each of the other operative provisions in the act, reasoning that all of the act's provisions were “obviously meant to work together” and be “deployed in tandem.” *Id.* at 1483. Because Congress would not have wanted the otherwise-valid provisions “to stand alone,” the Court declined to sever them. *Id.*

SB 2038 is unconstitutional, void and unenforceable for the reasons set forth above, regardless of whether the removal of property from a city's ETJ is accomplished through petition or election.⁸¹ On its face, it violates multiple sections of the Texas Constitution.

Specifically, if Section 1 (which created Subchapters D and E of Chapter 42 of the Texas Local Government Code) is held to be unconstitutional and invalid, then Sections 2-5 of SB 2038 must also be declared invalid because they are dependent upon Section 1, which provides for the unconstitutional delegation of authority in the first instance. If individuals have not been properly empowered by the Legislature to make the final and unreviewable decision relating to which laws they wish to apply to their own (and their unknowing neighbors') property, then the remaining sections of SB 2038 may not independently survive and must be invalidated as well. Accordingly, Grand Prairie seeks a declaration that pursuant to § 311.032(c), the remaining sections of SB 2038 are declared invalid because SB 2038 contains no

⁸¹ See Local Government Code, Chapter 42, Subchapters D and E.

severability clause and they cannot be given effect without the ETJ removal provisions set forth in Section 1.

VII. DECLARATORY JUDGMENT ACTION

SB 2038 VIOLATES THE TEXAS CONSTITUTION'S PROHIBITION ON UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE AUTHORITY TO PRIVATE PARTIES

The UDJA is remedial in nature. It is intended to settle and afford relief from uncertainty and insecurity with respect to rights under a statute and must be liberally construed to achieve that purpose.

An actual controversy has arisen and now exists between the parties concerning their respective rights and obligations under Texas law. Each has an interest that would be affected by SB 2038.

Pursuant to Texas Civil Practice and Remedies Code §§ 37.001 et seq., Grand Prairie seeks the following declarations from the Court under the UDJA:

- a. **SB 2038 violates the Separation of Powers Doctrine by delegating legislative decisions to private property owners:** SB 2038 violates Article II, Section 1 of the Texas Constitution (the separation of powers) because its petition mechanism constitutes an unconstitutional delegation of legislative authority to private parties, in violation of the standard articulated by the Texas Supreme Court.
- b. **SB 2038 violates Due Course of Law for being unconstitutionally vague:** SB 2038 violates Article I, Section 19 of the Texas Constitution (due course of law) and is unconstitutionally vague in its use of the phrases “majority in value” and “as indicated by the tax rolls” because it fails to provide a definite standard to determine which property value must be used or considered.
- c. **SB 2038 violates Due Course of Law for lack of notice and an opportunity of property owners to be heard:** SB 2038

violates Article I, Section 19 of the Texas Constitution (due course of law) because its petition mechanism fails to provide affected ETJ property owners notice and a meaningful opportunity to be heard prior to the removal of property from a city's ETJ.

- d. **SB 2038 violates Equal Protection for treating adjacent property owners differently in an election;** SB 2038 violates Article 1, Section 3 of the Texas Constitution (equal protection) because its election mechanism only permits property owners who reside in a city's ETJ to vote for or against removal, thereby treating property owners who do not reside in the ETJ and municipal residents differently and less favorably.
- e. **SB 2038 directly conflicts with Local Government Code § 42.023:** SB 2038 conflicts with existing Texas Local Government Code Section 42.023, which provides that a governing body's consent is required before a city's ETJ can be reduced; however, SB 2038 can be harmonized with Section 42.023 by finding that the governing body's specific consent to reduce ETJ is required before SB 2038's provision that ETJ is removed by operation of law is operative. Alternatively, SB 2038 conflicts with existing Texas Local Government Code Section 42.023, which provides that a governing body's consent is required before a city's ETJ can be reduce; therefore, SB 2038 cannot be harmonized with Section 42.023, and as the more specific previously enacted provision, it controls over SB 2038 because the Legislature's intent to have the more general operation of law provision in SB 2038 is not manifest.
- f. **SB 2038 violates Texas Government Code § 311.032(c) because it is interdependent and contains no severability clause:** SB 2038 is invalidated in its entirety because pursuant to § 311.032(c) of the Texas Government Code ("Code Construction Act"), Sections 2-5 of SB 2038 are invalid because SB 2038 contains no severability clause and they cannot be given effect without the ETJ removal provisions set forth in Section 1.

VIII. CONDITIONS PRECEDENT

All necessary conditions precedent have been performed or have occurred.

IX. REQUEST FOR DISCLOSURES

Pursuant to Texas Rule of Civil Procedure 194.2, Grand Prairie hereby request that Defendant, the State of Texas, make the disclosures identified in Texas Rule of Civil Procedure 194.2 (a-i) and (l) within fifty (50) days of the service of this Petition.

X. PRAYER FOR RELIEF

Grand Prairie is entitled to the relief requested, which is in the best interest of the public health, safety, and welfare. For the foregoing reasons, Grand Prairie respectfully requests that Defendant, the State of Texas, be cited to appear and answer, that this Court to set Grand Prairie's Declaratory Judgment action for an *expedited* full trial on the merits and, after the trial, that this Court issue a declaration that SB 2038 is unconstitutional, void and unenforceable, in its entirety. Grand Prairie, therefore, respectfully requests that this Court enter judgment against Defendant:

1. Enter the following declarations in its favor:
 - a. **SB 2038 violates the Separation of Powers Doctrine by delegating legislative decisions to private property owners:** SB 2038 violates Article II, Section 1 of the Texas Constitution (the separation of powers) because its petition mechanism constitutes an unconstitutional delegation of legislative authority to private parties, in violation of the standard articulated by the Texas Supreme Court.
 - b. **SB 2038 violates Due Course of Law for being unconstitutionally vague:** SB 2038 violates Article I, Section 19 of the Texas Constitution (due course of law) and is unconstitutionally vague in its use of the phrases "majority in value" and "as indicated by the tax rolls" because it fails to provide a definite standard to determine which property value must be used or considered.
 - c. **SB 2038 violates Due Course of Law for lack of notice and an opportunity of property owners to be heard:** SB 2038 violates

Article I, Section 19 of the Texas Constitution (due course of law) because its petition mechanism fails to provide affected ETJ property owners notice and a meaningful opportunity to be heard prior to the removal of property from a city's ETJ.

- d. **SB 2038 violates Equal Protection for treating adjacent property owners differently in an election;** SB 2038 violates Article 1, Section 3 of the Texas Constitution (equal protection) because its election mechanism only permits property owners who reside in a city's ETJ to vote for or against removal, thereby treating property owners who do not reside in the ETJ and municipal residents differently and less favorably.
 - e. **SB 2038 directly conflicts with Local Government Code § 42.023:** SB 2038 conflicts with existing Texas Local Government Code Section 42.023, which provides that a governing body's consent is required before a city's ETJ can be reduced; however, SB 2038 can be harmonized with Section 42.023 by finding that the governing body's specific consent to reduce ETJ is required before SB 2038's provision that ETJ is removed by operation of law is operative. Alternatively, SB 2038 conflicts with existing Texas Local Government Code Section 42.023, which provides that a governing body's consent is required before a city's ETJ can be reduce; therefore, SB 2038 cannot be harmonized with Section 42.023, and as the more specific previously enacted provision, it controls over SB 2038 because the Legislature's intent to have the more general operation of law provision in SB 2038 is not manifest.
 - f. **SB 2038 violates Texas Government Code § 311.032(c) because it is interdependent and contains no severability clause:** SB 2038 is invalidated in its entirety because pursuant to § 311.032(c) of the Texas Government Code ("Code Construction Act"), Sections 2-5 of SB 2038 are invalid because SB 2038 contains no severability clause and they cannot be given effect without the ETJ removal provisions set forth in Section 1.
2. Award Grand Prairie its reasonable and necessary attorney's fees pursuant to the UDJA, Texas Civil Practice and Remedies Code, §37.009.
 3. All other relief, general or special, whether in law and equity, to which Grand Prairie may be justly entitled.

Respectfully submitted,

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