

EDD HENDEE, INDIVIDUALLY AND AS	§	IN THE DISTRICT COURT
EXECUTIVE DIRECTOR OF C.L.O.U.T.	§	
<i>Plaintiffs,</i>	§	
	§	
v.	§	OF TRAVIS COUNTY, TEXAS
	§	
DAVID DEWHURST, TOM CRADDICK	§	
SUSAN COMBS,	§	
STATE OF TEXAS, AND THE TEXAS	§	
LEGISLATIVE BUDGET BOARD	§	
<i>Defendants.</i>	§	345 th JUDICIAL DISTRICT

**PLAINTIFFS’ FIRST AMENDED PETITION and
REQUEST FOR TEMPORARY AND PERMANENT INJUNCTIVE RELIEF**

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES **EDD HENDEE** Individually and as **Executive Director of Citizens Lowering Our Unfair Taxes PAC (CLOUT)** (hereinafter called “Plaintiffs”), complaining of **DAVID DEWHURST**, in his official capacity as Lieutenant Governor, **TOM CRADDICK**, in his official capacity as Speaker of the House of Representatives, about **SUSAN COMBS**, in her official capacity as Comptroller of Public Accounts for the State of Texas, the **STATE OF TEXAS**, and the **LEGISLATIVE BUDGET BOARD (“LBB”)**, (hereinafter called “Defendants”), and for cause of action shows unto the Court the following:

DISCOVERY CONTROL PLAN LEVEL

1. Plaintiffs intend that discovery be conducted under Discovery Level 2.

PARTIES AND SERVICE

2. Plaintiff, Edd Hendee is an individual and a resident of the State of

Texas. His business address is 10505 Katy Freeway, Houston, Texas 77024. Edd
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Hendee is a residential and business property taxpayer. C.L.O.U.T. is an association of Texas residential and business property taxpayers of which Hendee is the executive director.

3. Defendant David Dewhurst, an individual sued in his official capacity as Lieutenant Governor of the State of Texas and as Co-Chairman of the Legislative Budget Board, is a resident of the State of Texas. Dewhurst has made an appearance herein for all purposes.

4. Defendant Tom Craddick, an individual sued in his official capacity Speaker of the Texas House of Representatives of the State of Texas and as Co-Chairman of the Legislative Budget Board, is a resident of the State of Texas. Craddick has made an appearance herein for all purposes.

5. At the time Plaintiff's Original Petition was filed, Carole Keeton Strayhorn was sued in her official capacity as Comptroller of Public Accounts. Susan Combs is Strayhorn's successor and assumes Strayhorn's position in this litigation. Combs in her official capacity as Comptroller of Public Accounts has made an appearance herein for all purposes.

6. Defendant the State of Texas is a government entity and has made an appearance herein for all purposes.

7. Defendant the Legislative Budget Board is a government entity and the Legislative Budget Board describes itself on its website (<http://www.lbb.state.tx.us/>) as "a permanent joint committee of the Texas Legislature that develops recommendations for legislative appropriations for all agencies of state government."

The Legislative Budget Board has made an appearance herein for all purposes.

JURISDICTION AND VENUE

8. The subject matter in controversy is within the jurisdictional limits of this court.

9. This court has jurisdiction over the parties because Defendants are Texas residents and the State of Texas is a party and because Defendant's conduct that forms the basis of this suit occurred in Travis County.

10. Venue in Travis County is proper in this cause under Section 15.002(a)(1) of the Texas Civil Practice and Remedies Code because all or a substantial part of the events or omissions giving rise to this lawsuit occurred in Travis county and because one of the Defendants is the State of Texas.

NATURE OF ACTION

11. This is an action arising under Article VIII, Sec. 22(a) of the Texas Constitution and Section 316.001 of the Texas Government Code for declaratory relief pursuant to the Texas Uniform Declaratory Judgment Act, TEX. CIV. PRAC. & REM. CODE § 37.001. Additionally, Plaintiffs seek temporary and permanent injunctive relief in order to enjoin Defendants from, among other acts, violating these spending limitation provisions of the Texas Constitution and the Texas Government Code.

STANDING

12. Plaintiff Hendee has standing as a citizen of Texas and as a residential and business taxpayer. C.L.O.U.T has associational standing to sue in this court as its

members, as individual taxpayers and Texas citizens, have standing to sue in their individual capacities. C.L.O.U.T.'s members pay, among others, property taxes, business taxes, and sales taxes. Additionally, C.L.O.U.T's members are required in some instances to collect and remit tax monies. In *Williams v. Lara*, 52 S.W.3d 171 (Tex. 2001) and a series of cases going back more than a century,¹ the Texas Supreme Court held that taxpayers have standing to seek injunctive relief and need not demonstrate a particularized injury. Further, C.L.O.U.T.'s purpose as an association of individual taxpayers is to protect its taxpaying members from the illegal expenditures challenged by this lawsuit. Such a challenge to the illegal expenditures can be made by the association without the participation of C.L.O.U.T.'s individual members. The only requirements for such standing are that:

- (1) the plaintiff is a taxpayer; and
- (2) public funds are expended on the allegedly illegal activity.

Williams, 52 S.W.3d at 179

13. At the top of page 179, *Lara* cites cases from 2000, 1972 and 1944 for the proposition that Texas “[t]axpayers have standing to enjoin the illegal expenditure of public funds, and need not demonstrate a particularized injury.” The 1972 case, *Calvert v. Hull*, 475 S.W.2d 907 (Tex. 1972) in turn cited the famous “chicken salad”

1. ¹ *Looscan v. The County of Harris*, 58 Tex. 511 (Tex. 1887), *City of Austin v. McCall*, 95 Tex. 565, 68 S.W. 791 (Tex. 1902), *Terrell v. Middleton*, 187 S.W. 1138 (Tex.Civ.App.—San Antonio 1916), *writ ref'd* with concurring opinion, 108 Tex. 14, 191 S.W. 1138 (Tex. 1917), *Osborne v. Keith* 177 S.W.2d at 201 (Tex. 1944), *Calvert v. Hull*, 475 S.W.2d 907 (Tex. 1972) *Bland I.S.D. v. Blue*, 34 S.W.3d 547 (Tex. 2000), *Williams v. Lara*, 52 S.W.2d3d 171 (Tex. 2001)

case from 1916, *Terrell v. Middleton*, 187 S.W. 1138 (Tex.Civ.App.—San Antonio 1916), *writ ref'd* with concurring opinion, 108 Tex. 14, 191 S.W. 1138 (Tex. 1917).

14. *Middleton* held that a citizen taxpayer could obtain injunctive relief against the state Comptroller was appropriate when the governor of Texas sought to expend \$150 in state funds on chicken salad from the Driscoll Hotel in Austin. “Citizens are allowed to prevent, by injunction, the collection of illegal taxes, and the reasons for allowing them this power are no stronger than to allow restraint of an officer who seeks to expend the taxes when collected for an illegal or unconstitutional purpose. The diversion of the taxes after collection from legal purposes would be equally as injurious to the taxpayer as the collection of illegal taxes. In either event, the burdens of the taxpayer are increased.” *Terrell v. Middleton* 187 S.W. 367, 370; (Tex.Civ.App.—San Antonio 1916). That expenditure was held to violate the state Constitution, which then limited the governor’s compensation to \$4,000 “and no more,” including no expenditures for chicken salad.

15. The 2000 case cited in *Lara, Bland I.S.D. v. Blue*, 34 S.W.3d 547 (Tex. 2000), written by Justice Hecht, with Justice Abbot in the six-justice majority, cited the same rule, and cited as authority, *inter alia*, the 1902 case of *City of Austin v. McCall*, 95 Tex. 565, 68 S.W. 791 (Tex. 1902). The court said in *Bland*: “But in Texas law there is a long-established exception to this general rule: a taxpayer has standing to sue in equity to enjoin the illegal expenditure of public funds, even without showing a distinct injury.” This doctrine, recently reaffirmed by the Court, is well-established in Texas

law. *See also Looscan v. The County of Harris*, 58 Tex. 511 (Tex. 1887), *Osborne v. Keith* 177 S.W.2d at 201 (Tex. 1944) (“This court recognizes the right of a taxpaying citizen to maintain an action in a court of equity to enjoin public officials from expending public funds under a contract that is void or illegal.”) and *Calvert v. Hull*, 475 S.W.2d 907 (Tex. 1972) (“The five Appellants, taxpayers and owners of real property in Ector County, have standing to bring the suit. *Terrell v. Middleton*, 187 S.W. 367, Tex.Civ.App. 1916”).

16. *Lara* applied the long-standing Texas standard of taxpayer standing to municipal taxpayers suing over establishment clause claims. But *Lara* also reaffirmed the century-old doctrine that Texas taxpayers may sue over illegal spending. *See Williams v. Lara*, 52 S.W.2d3d 171 (Tex. 2001) (“As a general rule of Texas law, to have standing, unless it is conferred by statute, a Appellant must demonstrate that he or she possesses an interest in a conflict distinct from that of the general public, such that the Appellee's actions have caused the Appellant some particular injury. [*179] *See Hunt v. Bass*, 664 S.W.2d 323, 324 (Tex. 1984). Taxpayers, however, fall under [**14] a limited exception to this general rule. *See Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 556 (Tex. 2000). Taxpayers in Texas have standing to enjoin the illegal expenditure of public funds, and need not demonstrate a particularized injury. *See id.; Calvert v. Hull*, 475 S.W.2d 907, 908 (Tex. 1972); *Osborne v. Keith*, 142 Tex. 262, 177 S.W.2d 198, 200 (Tex. 1944).”) Plaintiffs are taxpayers and this suit seeks declaratory and injunctive relief to stop and prevent unconstitutional and illegal spending by the

the injury to taxpayers caused by excessive spending. From 1984 to 2000 alone, excessive spending – the spending increases beyond the growth in the gross state product – have cost Texas families an average of \$26,800. (See Exhibit A, Hartman, David, Restraining Growth of Texas State Government Spending, Lone Star Foundation, October 8, 2000.)

FACTS

17. Article VIII, Sec. 22 of the Texas Constitution provides:

(a) In no biennium shall the rate of growth of appropriations from state tax revenues not dedicated by this constitution exceed the estimated rate of growth of the state's economy. The legislature shall provide by general law procedures to implement this subsection.

(b) If the legislature by adoption of a resolution approved by a record vote of a majority of the members of each house finds that an emergency exists and identifies the nature of the emergency, the legislature may provide for appropriations in excess of the amount authorized by Subsection (a) of this section. The excess authorized under this subsection may not exceed the amount specified in the resolution.

(c) In no case shall appropriations exceed revenues as provided in Article III, Section 49a, of this constitution. Nothing in this section shall be construed to alter, amend, or repeal Article III, Section 49a, of this constitution. (Added Nov. 7, 1978.)

14. Texas Government Code Section 316.001 similarly provides:

The rate of growth of appropriations in a biennium from state tax revenues not dedicated by the constitution may not exceed the estimated rate of growth of the state's economy.

15. Lieutenant Governor David Dewhurst is a proper defendant in this matter in his official capacity. He is a presiding officer of the Senate and Co-Chairman of the Legislative Budget Board. The Senate is responsible for implementation of Article VIII,

Section 22 of the Texas Constitution.

18. Speaker of the House of Representatives Tom Craddock is a proper defendant in this matter in his official capacity. He is a presiding officer of the House of Representatives and Co-Chairman of the Legislative Budget Board. The House of Representatives is responsible for implementation of Article VIII, Section 22 of the Texas Constitution.

19. The Comptroller of Public Accounts Susan Combs (Comptroller) is a proper defendant in this matter in her official capacity. Article III, Section 49(a) of the Texas Constitution charges the Comptroller with providing the Legislature an accurate estimate of the amount of money that the Legislature may spend consistent with the Constitution in the forthcoming biennium. According to the Comptroller's own website, "The Comptroller is the state's chief fiscal officer who collects the state's revenue and monitors and accounts for all state spending." (See Exhibit B, Comptroller of Public Accountants website) The Comptroller's website further states, "The Comptroller has a constitutional obligation to protect and ensure a balanced, pay-as-you-go, no-deficit spending budget." *Id.* The Comptroller's website also states, "As Texas' chief fiscal officer, the Comptroller has a constitutional responsibility to estimate available revenue for the state and is required to supervise the state's fiscal concerns and manage them."

20. The State of Texas is a proper defendant in this matter because the State has an obligation to its citizens to comply with the provisions of the Constitution.

21. The Legislative Budget Board is a proper defendant in this matter

because of the responsibilities delegated to it by the legislature. The Legislative Budget Board website states, “The following is a summary of significant responsibilities assigned by statute to the LBB: Adopt a constitutional spending limit. Section 316, Govt. Code; Article 8, Section 22, Texas Constitution...” (See Exhibit C, Texas Legislative Budget Board website.) However, Article VIII, Sec. 22(b) of the Texas Constitution provides in relevant part: “The legislature shall provide by general law procedures to implement this subsection.” The setting of the spending limit is clearly the most important implementation mechanism that the Legislature must carry out under this provision. Accordingly, the Constitution requires that the Legislature adopt the constitutional spending limit.

22. The State Defendants presented for the first time in their petition for review before the Supreme Court a fact that fundamentally undermines all their various arguments about expanding the Article VIII, §22 limit of \$52,145,745,157 to a larger number. That fact is on the very last page of the Appellants’ Appendix, Section 13.09 of House Bill 1. (reproduced as Exhibit “U”.) That section sets the Article VIII, § 22 limit for the 2006-2007 biennium at precisely that number--\$52,145,745,157, no more, no less. There is no mention of the various larger numbers put forth by the State. There is specific authorization in that section for some “adjust[ment of] the composition of fund and account balances without any net change in balances or change in appropriations” **by the Comptroller** in order to comply with Article VIII, § 22. There is no mention of any authority of the LBB or the other defendants to raise the HB 1 setting of the Article VIII, Section 22 limit.

23. Interestingly, State Defendants recited the bills passed in the third Special Session of the 79th Legislature on page 9 of their Petition for Review. None of those four bills purport to raise the Article VIII, §22 limit set by law in HB 1 of the Regular session of the 79th Legislature. HB 1 for the first called session also does not purport to raise the limit. No HB 1 was introduced in the second called session. This would seem to be a singularly persuasive piece of legislative history. HB 1 of the regular session of the 79th Legislature is, in fact, the actual enacted and effective statute, duly enacted by the Legislature setting the Art. VIII, Section 22 limit for that biennium. **No other statute passed by the Texas Legislature at any time raised this limit for the current biennium.**

24. The Texas Supreme Court has interpreted Article III, Section 1 of the Texas Constitution and concluded that: “[a] settled maxim of constitutional law is that the power conferred upon the legislature to make the laws cannot be delegated by that department to any other body or authority.” *Proctor v. Andrews*, 972 S.W.2d 729, 733 (Tex. 1998). Further, the fact that the LBB staff has been delegated responsibility by some legislators, does not provide any justification for this improper delegation. Plaintiffs recognize that the Third Court, in its previous opinion in this case, has rejected this improper delegation argument. Plaintiffs do not intend to abandon this argument, and include it again here for the purpose of preserving the argument should this litigation be reviewed by the Texas Supreme Court at a later time.

25. Over 90 percent of legislators do not serve on the LBB and their constituents are therefore not represented insofar as the determination of the

constitutional spending limit.

26. Plaintiffs further allege that the delegation is improper under the Texas Supreme Court's jurisprudence because the Legislature has failed to establish "reasonable standards" to guide the LBB in determining the constitutional spending limit. In fact, the standards used have proven to be inaccurate, often missing greatly the actual growth rates for state personal income. (See Exhibit D, Growth in State Personal Income.) See Texas Gov't Code, Section 316.002(b): "Except as provided by Subsection (c), the board shall determine the estimated rate of growth of the state's economy by dividing the estimated Texas total state personal income for the next biennium by the estimated Texas total state personal income for the current biennium. Using standard statistical methods, the board shall make the estimate by projecting through the biennium the estimated Texas total state personal income reported by the United States Department of Commerce or its successor in function." And also see Section 316.002(e): "In the absence of an action by the Legislative Budget Board to adopt a spending limit as provided in Subsection (a) and (b), the estimated rate of growth in the state's economy from the current biennium to the next biennium shall be treated as if it were zero, and the amount of state tax revenues not dedicated by the constitution that could be appropriated within the limit established by the estimated rate of growth in the state's economy shall be the same as the level of appropriations for the current biennium." The requirement of "reasonable standards" to guide any delegation of legislative power was recognized in *Texas Boll Weevil Eradication Foundation, Inc. v. Lewellen*, 952 S.W.2d 454 (Tex. 1997).

The Ad-Hoc Committee

27. The Plaintiffs further allege that Section 316.005 of the Government Code amounts to an unconstitutional delegation for the same reasons stated above and others detailed below. This provision states that a “committee composed of the **governor**, lieutenant governor, speaker of the house of representatives, and **comptroller of public accounts** shall approve the spending limit adopted by the LBB.” (emphasis added.) Such an ad-hoc committee is forbidden by the Texas Constitution, Article 1, Section 2, the separation of powers provision:

The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; 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. Tex. Const., Art I, Sec. II.

There is no constitutional basis for the creation of this ad hoc committee, which combines officials of the executive and legislative branches. Furthermore, the Legislature may not delegate its own constitutional authority to enforce the spending limit under Article VIII, Sec. 22(b). Finally, this ad-hoc committee conflates and commingles the powers of the legislative and executive branches in violation of Article II, Section 1 of the Texas Constitution and the separation of powers doctrine.

The Legislative Budget Board

28. The Plaintiffs note that the LBB is only mentioned once in the entire Texas Constitution in Article III, Section 49-j where it states in relevant part: “(2) the issuer demonstrates to the satisfaction of the Bond Review Board or its successor

designated by law that the bonds no longer require payment from general revenue, and the Bond Review Board so certifies to the Legislative Budget Board or its successor designated by law. (Added Nov. 4, 1997.)” This narrow provision relating to bonds offers no basis for delegating the constitutional authority to enforce the spending limitation amendment enacted in 1978.

29. On November 17, 2004, the Legislative Budget Board (LBB) approved a resolution setting \$52.145 billion as the maximum amount that can be spent from non-dedicated revenues pursuant to Article VIII, Sec. 22(a) for the 2006-2007 biennium. (See Exhibit E, Notice of Meeting of the Legislative Budget Board.) This threshold was based on 2004-2005 spending from non-dedicated state tax revenues of \$46,834,691,177 and their estimate that Texans’ state personal incomes would grow at a rate of 11.34 percent from the 2004-2005 biennium to the 2006-2007 biennium. Note, however, that ($\$46,834,691,177 \times 11.34 = \$53,110,539,794,718$)

30. In December 2005, the LBB published Fiscal Size Up 2006-2007 Edition and contained therein is an overview of the limit on the growth of certain appropriations on Page 15. The LBB states, “The board instructed staff to adjust the level of 2004-2005 appropriations from state tax revenue not dedicated by the Constitution and 2006-2007 spending limit calculations to reflect subsequent 2005 appropriations certified by the Comptroller.” There is no notation of any Article VIII, Section 22 authority for this revision. The State of Texas by “actions taken in 2005” affected the level of appropriations from state tax revenue not dedicated by the Constitution. What these actions are, and how they could possibly affect the Article

VIII, Section 22 limitation once it has been calculated, is unclear. The conclusion of the LBB is that the 2006-2007 biennium spending limit is now \$55.6 billion. (*See* Exhibit F, Legislative Budget Board Fiscal Size-up 2006-2007 Biennium.)

31. The LBB uses state personal incomes as the sole barometer of the projected growth in the state's economy for purposes of complying with Article VIII, Sec. 22(a). (*See* Exhibit G, Legislative Budget Board Technical Memo on Implementation of Constitutional Limitation on Spending.) This barometer has been historically proven to wildly overstate the growth in the state's economy, permitting excessive increases in spending contrary to the intent of the constitutional and statutory spending restraint provisions at issue in this case. For example, in 1978-1979, this barometer resulted in a projected 34.9 percent biennial growth rate in the state's economy, a highly inflated figure that would be historically unprecedented. (*See* Exhibit G, Legislative Budget Board Technical Memo on Implementation of Constitutional Limitation on Spending.) Gross State Product ("GSP") is a barometer of "growth of the state's economy" more consistent with sound economic practice and the intent of the constitutional and statutory provisions at issue. "(a) In no biennium shall the rate of growth of appropriations from state taxes revenues not dedicated by this constitution exceed the estimated rate of growth of the state's economy. The legislature shall provide by general law procedures to implement this subsection." Tex. Const., Art. VII, Sec. 22(a). The specific language "growth of the state's economy" refers to the growth of the entire state economy, not the growth of a single component of the state economy, e.g., state personal income. The Comptroller's own projections show

that the Gross State Product generally increases at a lower rate than the growth in state personal incomes and, for the 2006-2007 fiscal years, the Gross State Product is projected to increase 10.4 percent. (*See Exhibit H, The Texas Economy, Fiscal Years, Carole Keeton Strayhorn, Texas Comptroller and Global Insight, Inc.*) Accordingly, the “state’s economy” should be interpreted to mean the entire, economy, not a discrete component.

32. A detailed report on Texas state spending by economist and former Hartland Bank Chairman David Hartman stated, “It should be noted that Personal Income has not proven to be an appropriate measure of growth of the state’s economy as defined by Article VIII, Section 22’s enabling legislation. As shown in Table I, the actual measure of the state’s economy, Gross State Product, grew 423.4% over the 20-year period 1978-1979 to 2000-2001. Over the same period, state personal income grew 498.7%, 75.3% more than GSP. Unfortunately for taxpayers, total spending by Texas state government grew far more than either, 42.2% more than PI and 91% more than GSP.” (*See Exhibit A, Hartman, David, Restraining Growth of Texas State Government Spending, Lone Star Foundation, October 8, 2000*).

33. In April 2006, the Comptroller released the 2006-2007 Certification Revenue Estimate, which included a Transmittal Letter. (*See Exhibit I, Transmittal Letter, and Supporting Tables and Exhibit J, Supporting Tables.*) Table 1, which shows the various sources of General Revenue-Related Funds, indicates that, after deducting the motor fuels taxes which are mostly dedicated under the Constitution, the Comptroller is authorizing the Legislature to spend available non-dedicated, non-

federal revenues of \$53 billion for the 2006-2007 biennium, under the pay as you go provision, Article III, Section 49a of the State Constitution, not Article VIII, Section 22. (See Exhibit F, Legislative Budget Board Fiscal Size-up 2006-2007 Biennium.) This amount exceeds the \$52.145 billion threshold that the LBB's own analysis and resolution determined could be spent in compliance with Article VIII, Sec. 22(a) and Texas Government Code Section 316.001. (See Exhibit E, Notice of Meeting of the Legislative Budget Board.) The Comptroller's Transmittal Letter makes no mention of Article VIII, Sec. 22(a) or Texas Government Code Section 316.001.

34. On November 22, 2005, the Texas Supreme Court issued a decision in the school finance case, requiring that the Legislature convene for a special session concerning property taxes and education funding so that a new plan would be approved by June 1, 2006. (See *Neeley v. West Orange-Cove CISD*, 176 SW3d 746 (Tex. 2005).) Accordingly, Governor Rick Perry called a special session in April. (See Exhibit K, Governor's Proclamation, dated April 17, 2006.)

35. During that special session, the Legislature passed and the Governor signed House Bill 1, an appropriations bill. According to the May 11, 2006 Fiscal Note ***prepared by the Legislative Budget Board*** for the enrolled version of H.B. 1, that bill would have a two year net impact to General Revenue Related Funds of approximately \$3.9 billion (exactly \$3,922,431,140). (See Exhibit L, 79(3) HB1 Enrolled - Fiscal Note). This note stands in stark contrast to the claim submitted by the state to the Third Court that the total amount of all appropriations in the third called session was \$3.87 billion. (Brief of Appellees before the Third Court, page 10, reproduced as Exhibit "R").

As the state recognized in that briefing, the state made additional appropriations in that session above and beyond just HB 1; HB 3, HB 63, and HB 153. The Fiscal Notes for the latter three bills are attached as Exhibit Q. As the state admitted in its Brief, the cumulative cost of these bills in the current (2006-2007) biennium is \$41.3 million.

36. Based on the appropriations made prior to the 2006 special session, the Legislature had appropriated \$53.0 billion in Non-Dedicated General Revenue Related Funds. This exceeded the limit of \$52.145 billion, which was still less than the \$55.6 billion staff generated unapproved limit. (*See* Exhibit M Legislative Budget Board Constitutional Spending Limit Briefing Document, and Exhibit N, House Research Organization State Finance Report, Texas Budget Highlights Fiscal 2006-07, p.4, paragraph 1). Therefore, according to the LBB documents prior to the 2006 special session, the Legislature had either already overspent by \$.85 billion or had only \$2.6 billion available to appropriate without violating Article VIII, Sec. 22(a) of the Texas Constitution. Nonetheless, during the special session the legislature appropriated an additional \$3.9 billion dollars, which caused total appropriations to exceed even the unapproved staff generated limit by \$1.3 billion dollars. (*See* Exhibit L, 79(3) HB1 Enrolled - Fiscal Note). The appropriated spending exceeds the actual approved spending limit of \$52,145,745,157, documented in Exhibit E, by \$4.75 billion.

37. The state contends that the effective limit as of April 27, 2006 was \$55.5952 billion, according to the April 27, 2006 letter from John O'Brien, Deputy Director of the LBB to Dewhurst and Craddick. (Exhibit "S"). That letter also states that the available spending limit at that time was 3.95 billion. However, the official

LBB estimates of the bills passed in that session (HB1, 3, 63 and 153) totals \$3.963 billion. So, even using the official LBB estimates offered by the state, in combination with the staff-approved unofficial spending limit estimates, the Legislative appropriations exceed the cap by at least \$15 million dollars. Under no set of facts presented by the state are they not in violation of the Article VIII, Sec. 22 constitutional spending limit.

38. Plaintiffs ask that the Court declare the appropriation in HB 1 of the Third Special Session of the 79th Texas Legislature to be unconstitutional on that basis, as a violation of Article VIII, Section 22.

39. Additionally, the numbers used per the LBB documents are illegal in the amounts they allow the Legislature to spend. Not only are the numbers significantly greater than the actual rate of growth in the state's economy by using the inaccurate state personal income number instead of the Gross State Product number, a problem that has compounded over the decades, but there is no feedback mechanism - that is, there is no controlling reduction (or increase) in the growth numbers when the projections are in error. Thus, the effect shown in paragraph 32, above, where over the 20-year period spending grew by 42.2% more than even the inflated state personal income numbers.

40. The Base Period Appropriations for 1980-1981, when Article VIII, Section 22(a) of the Texas Constitution was approved was 11.42 billion dollars. Since then state personal income has increased 416.31%, Gross State Product has increased 360.70%, and Population plus Inflation has increased by 271.51%. (*See Exhibit O,*

Calculation of Constitutional Limitation on Appropriations.) In the 2004-2005 Base Period Biennium (as adjusted in 2005 by the LBB staff) the Appropriations were \$49.9 billion dollars. Based upon projected increase for 2006-2007 for state personal income increase estimate of 11.34% for GSP of 10.42% and Population + Inflation of 8.24%. The constitutional limit on appropriations for the 2006-2007 biennium would therefore vary from \$55.6 billion to \$55.1 billion to \$54.0 billion (An increase of 486.86%, 482.49% or 472.85% from the initial adoption of the spending limit.) The variation from different measures is more than a billion and half dollars for a single budget cycle.

41. The cumulative effects of more than twenty years of systematic violation of Article VIII, Section 22(a) are obviously substantial. (*See Exhibit P, Actual Appropriations vs. Limits Based on Alternative Measures of Growth.*)

42. The effect of the passing of the buck on the estimate of growth from the Legislature, as Article VIII, Section 22(a) clearly contemplated, to a mere committee, no less, has been, in effect, to extinguish accountability for these inaccurate and statistically unsupportable numbers. Members may vote to expend greater amounts than the Constitution permits, and they may blame the unelected board. Further, the LBB delegated the responsibility of the legislature under Article VIII, Section 22(a) to staff - non-legislative, non-executive members to adjust the level of spending allowable in the 2006-2007 biennium. It is neatly done, but it is clearly in contravention of the clear intent of Article VIII, Section 22(a). "In no biennium shall the rate of growth of appropriations from state tax revenues not dedicated by this constitution exceed the

estimated rate of growth of the state's economy. *The legislature* shall provide by general law procedures to implement this subsection.” [emphasis added.] There is no mention of subsequent adjustments of limits by staff, and the resolution attached as the final page of Exhibit E makes no provision for such adjustments. The Legislature must provide for the implementation of this section. To the extent spending in excess of the caps imposed by Article VIII, Section 22(a) is appropriated, it is clearly and expressly made the responsibility of the legislature by Article VIII, Section 22 of the Constitution, which allows such spending only with a resolution declaring an emergency and setting out the nature of the emergency. (See, e.g., Senate Concurrent Resolution 20, 80th Legislature, attached as Exhibit “T”.) Plaintiffs ask that the Court so declare the Legislature’s responsibility.

43. Plaintiffs ask this Court to declare that the growth in the measure of state personal incomes has, since its inception, overstated the growth in the state’s economy, thereby permitting excessive state spending and contravening the plain language and discernable intent of Article VIII, Sec. 22(a) of the Texas Constitution and Texas Government Code Section 316.001, which was designed to restrain state spending without regard to increases in tax revenues.

REQUEST FOR TEMPORARY AND PERMANENT INJUNCTIVE RELIEF

44. Plaintiffs request the following temporary and permanent injunctive relief:

(a) Plaintiffs request that Defendants be enjoined from spending monies for the

current biennium ending August 31, 2007 that have been illegally appropriated in excess of the constitutional spending cap. Plaintiffs request that the number calculated as the correct spending cap be calculated as described below in the first request for declaratory relief.

(b) Alternatively, or in addition, Plaintiffs request that Defendants be enjoined from using projected growth in personal incomes as the sole method for calculating the growth rate in the State's economy as such method consistently overstates the growth in the State's economy thereby permitting excessive and illegal spending in contravention of the intent of Article VIII, Se. 22(a) of the Texas Constitution and Texas Government Code Section 316.001.

(c) Alternatively or in addition, Plaintiffs request that Defendants be enjoined to adjust for any overstated amount from the previous biennium based on actual historic and not estimated or projected data, for purposes of measuring the growth rate in the state's economy whether by state personal income or otherwise, in each succeeding biennial projection.

(d) Alternatively, or in addition, Plaintiffs request that Defendants be enjoined from using the growth in government salaries in the calculation of growth in personal income and ordering that only growth in private sector personal income be used.

(e) Alternatively, or in addition, Plaintiffs request that Defendants be enjoined from using data in successive biennia to calculate growth in the economy when that data has not been adjusted to reflect actual figures from the preceding biennium.

Plaintiffs request that defendants be required to reduce the projected growth rate in the state's economy for the forthcoming biennium by the percent that the growth rate was overestimated for the previous biennium using actual economic data from the preceding biennium.

(f) Alternatively, or in addition, Plaintiffs request that the Court issue an injunction requiring Defendants to recalculate the current spending limitation based upon actual historical data regarding increases in the growth of the state's economy from the effective date of Article VIII, Section 22 to the present.

(g) Alternatively, or in addition, Plaintiffs request that the Court issue an injunction requiring Defendants to submit to the Court a proposal setting forth a method for accurately and realistically measuring the growth of the state's economy which is consistent with the intent of Article VIII, Sec. 22(a) of the Texas Constitution and Texas Government Code Section 316.001.

45. It is probable that Plaintiff will prevail on one or more of its claims after a trial on the merits. It is not necessary prior to injunctive relief be granted that Plaintiffs prove they will ultimately prevail. *Keystone Life Ins. Co. v. Marketing Mgmt., Inc.*, 687 S.W.2d 89, 92 (Tex.App.—Dallas 1985, no writ). A reasonable probability of success, not an overwhelming likelihood, is all that need be shown for preliminary injunctive relief. In this Petition with its supporting evidence, Plaintiffs have established a prima facie case that the Defendants are either not currently complying with Article VIII, Sec. 22(a) of the Texas Constitution and Texas Government Code Section 316.001 and/or have or will act in

violation of these provisions.

46. Plaintiffs will suffer irreparable injury if injunctive relief is not granted and Plaintiffs have no adequate remedy at law. Since the time that Plaintiffs filed their original petition, the Defendants have engaged in litigation stalling tactics in order to allow the illegally spending to go unchecked in hopes that August 31, 2007 would arrive and the Defendants could argue that the money has been spent before this court could act to halt the illegally spending. Once monies are spent illegally they cannot be recovered without raising taxes on Plaintiffs and other taxpayers. Plaintiffs, in a case such as this, are unable to recover damages from the Defendants for their illegal spending. Consequently, the only remedies available to Plaintiffs are declaratory and injunctive relief. Both forms of relief are in the public interest, in part because some 84 percent of Texans voted for the Article VIII, Section 22 constitutional spending limitation and Texas citizen-taxpayers have a vested interest in the proper implementation of that spending limitation.

REQUEST FOR DECLARATORY RELIEF

47. Plaintiffs request several forms of declaratory relief.

(a) Plaintiffs request that Court issue a declaratory judgment stating the maximum amount that may be spent in the 2006-2007 biennium pursuant to Article VIII, Sec. 22(a) of the Texas Constitution and Texas Government Code Section 316.001. Plaintiffs ask that the Court set that number at no more than \$52.145 billion dollars (the original LBB 2006-2007 biennium maximum spending limit.), or alternatively, at no more than

\$55.138 billion dollars, an increase from the previous biennium number based on the increase in GSP (*See* Exhibit P, Calculation of Constitutional Limitation on Appropriations.), or alternatively, at the lower number resulting from a retroactive historic calculation of the maximum allowable increase each biennium since the enactment of Article VIII, Sec. 22(a), either \$52.613 billion (cumulative GSP) or \$43.368 billion (cumulative Population + Inflation).

(b) Alternatively or in addition, Plaintiffs ask this Court to issue a declaratory judgment stating that one or more of the Defendants are not complying with Article VIII, Sec. 22(a) of the Texas Constitution and Texas Government Code Section 316.001.

(c) Alternatively or in addition, Plaintiffs request that the Court enter a judgment declaring the various responsibilities of the Lieutenant Governor, Speaker of the Texas House of Representatives, Comptroller, LBB, State Auditor, the Texas Legislature, and other state entities for enforcing Article VIII, Sec. 22(a) of the Texas Constitution and Texas Government Code Section 316.001.

(d) Alternatively or in addition, Plaintiffs request a judgment declaring that the proper increase of growth in the state's economy under Article VIII, Section 22(a) would be either the growth in the Gross State Product or the combined growth of inflation and population.

(e) Alternatively, or in addition, Plaintiffs request a declaratory judgment declaring that correct measure for calculating growth in the State's economy be applied to the actual appropriations for the 2004-2005 biennium and that in turn that would supply the appropriate measurement for the 2006-2007 biennium and the true limitation on

state spending for said period. In addition, the court should declare that the legislature cannot appropriate funds for the 2006-2007 biennium beyond the limitation so established.

(f) Alternatively or in addition, Plaintiffs seek a declaratory judgment that, for purposes of measuring the growth rate in the state's economy whether by state personal income or otherwise, each succeeding biennial projection must be adjusted for any overstated amount from the previous biennium based on actual historic and not estimated or projected data.

(g) Alternatively or in addition, Plaintiffs seek a declaratory judgment that the adjustment of the constitutional spending limit for 2006-2007 biennium by the Legislative Budget Board staff on or about December 2005 is a violation of Article VIII, Sec. 22(a) and should be declared null and void.

(h) Alternatively or in addition, Plaintiffs seek a declaratory judgment that, Article VIII, Section 22(a) requires that the Legislature devise a feedback mechanism so that when growth of budget appropriations exceed the percentages appropriate to actual historic growth, as opposed to estimated or projected growth in the total state economy, that the subsequent budgets be restricted in their growth so as to avoid the problem delineated in Paragraph 32 above.

(i) Alternatively or in addition, Plaintiffs seek a declaratory judgment that the Legislative Budget Board is like any other committee of the Legislature, and the Legislature may not delegate its whole power and responsibility to the LBB any more than the Legislature may delegate its whole power and responsibility to any other

committee or staff, but the Legislature must, acting as a whole, pass into law prior to appropriation “the statement of the rate of growth of appropriations from state tax revenues not dedicated by [Texas’] constitution [which must not] exceed the estimated rate of growth of the state's economy.”

(j) Alternatively or in addition, Plaintiffs seek a declaratory judgment that the appropriation in HB 1 of the Third Special Session of the 79th Texas Legislature is unconstitutional on the basis that it exceeds the mandates of Article VIII, Section 22(a) as applied since its enactment, or alternatively that said appropriation is unconstitutional on the basis that it exceeds the mandates of Article VIII, Section 22(a) as applied over the last biennium, or alternatively that said appropriation is unconstitutional because it exceeds even the extremely generous and faulty estimates provided by the Legislative Budget Board, and is, according to the LBB’s own calculations, in violation of Article VIII, Section 22(a).

(k) Finally, alternatively or in addition, Plaintiffs request a declaratory judgment that the method used by the LBB to calculate the growth rate in the state’s economy – growth in state personal incomes – is unreliable and contrary to well-established principles of economics, whereby growth in Population plus Inflation or Gross State Product or a similar broad measurement should be used as a barometer for growth in the economy. Plaintiffs ask this Court to declare that the use of growth in state personal incomes as the sole barometer has, since its inception, wildly overstated the growth in the state’s economy, thereby permitting excessive spending and contravening the intent of Article VIII, Sec. 22(a) of the Texas Constitution and Texas Government

Code Section 316.001

48. Plaintiffs are entitled to declaratory relief under the Texas Uniform Declaratory Judgment Act, TEX. CIV. PRAC. & REM. CODE § 37.001. The Texas Uniform Declaratory Judgment Act provides that “a court of record within its jurisdiction has power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.” TEX. CIV. PRAC & REM CODE § 37.003. The Texas Uniform Declaratory Judgment Act is a remedial statute designed “to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations.” *Tex. Natural Res. Conservation Comm’n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002). A trial court has discretion to enter a declaratory judgment so long as it will serve a useful purpose or will terminate the controversy between the parties. *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 468 (Tex. 1995); *James v. Hitchcock Indep. Sch. Dist.*, 742 S.W.2d 701, 704 (Tex. App. –Houston [1st Dist.] 1987, writ denied).

49. A declaratory judgment in this case will clarify the meaning of Article VIII, Sec. 22(a) of the Texas Constitution and Texas Government Code Section 316.001, removing uncertainty on the part of taxpayers and the various government entities involved concerning who is responsible and accountable for implementation and how compliance should be measured. A declaratory judgment will also serve the public interest by providing some legal oversight to ensure that the intent of 84 percent of Texas voters who voted for the constitutional amendment is carried out.

REQUEST FOR ATTORNEYS FEES

50. In order to pursue the remedies requested herein, Plaintiffs are required to employ the undersigned counsel. Pursuant to the Texas Uniform Declaratory Judgment Act, Plaintiffs request that they be awarded reasonable and necessary attorney's fees for prosecuting these claims.

PRAYER

51. WHEREFORE, PREMISES CONSIDERED, Plaintiffs, Edd Hendee and C.L.O.U.T., respectfully pray that the Defendants be cited to appear and answer herein, and that upon a final hearing of the cause, judgment be entered for the Plaintiffs against Defendants for injunctive relief, declaratory relief, attorneys' fees, and such other and further relief to which the Plaintiffs may be entitled at law or in equity.

Respectfully submitted,

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Certificate of Service

I hereby certify that on the 31st day of July, 2007, a true and correct copy of the foregoing was hand delivered to the counsel for the defendants.

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