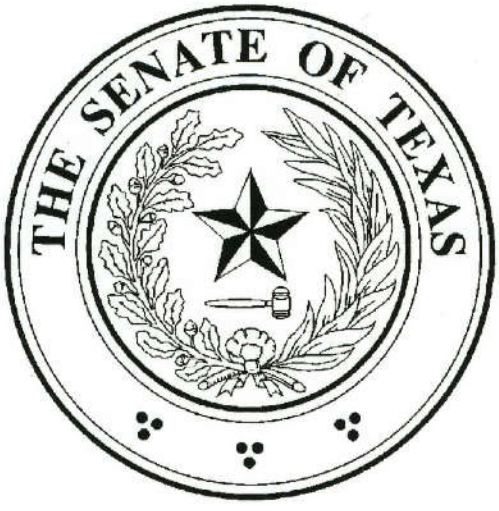
Senate Committee on State Affairs

Interim Report
to the
86th Legislature



December 2018

SENATE COMMITTEE ON STATE AFFAIRS

The Honorable Dan Patrick
Lieutenant Governor of Texas
Texas State Capitol
Austin, Texas 78701

Dear Lieutenant Governor Patrick:

The Senate Committee on State Affairs of the Eighty-Fifth Legislature hereby submits its interim report including findings and recommendations for consideration by the Eighty-Sixth Legislature.

Respectfully submitted,

Senator Joan Huffman, Chair

Senator Bryan Hughes, Vice-Chair

Senator Brian Birdwell

Senator Brandon Creighton

Senator Craig Estes

Senator Eddie Lucio

Senator Jane Nelson

Senator Charles Schwertner

Senator Judith Zaffirini

Vice Chair, Natural Resources
and Economic Development
Texas Judicial Council
Chair, Eagle Ford Shale
Legislative Caucus

Judith Zaffirini
State Senator, District 21
President Pro Tempore, 1997

Committees
Administration
Business and Commerce
State Affairs

November 17, 2018

Senator Joan Huffman, Chair
Senate Committee on State Affairs
Sam Houston Building 380
209 West 14th Street
Austin, Texas 78701

Dear Chair Huffman:

Thank you for your impressive leadership as Chair of the Senate Committee on State Affairs. It is my privilege to serve with you, and I appreciate the opportunity to share my perspective regarding the Committee's Interim Report to the 86th Legislature. The report includes many fine recommendations, and I am delighted to sign it. This letter, however, is to record my serious concerns about the sections recommending that the Legislature preempt local ordinances that protect persons on the basis of their "sexual orientation, military status, marital status, or gender identity" and that lawmakers address "specific violations of an individual, business, or organization's sincerely held religious belief."

We always should work to strike a careful balance between defending every person's right to practice his or her faith freely and ensuring one person's religious beliefs are not used as a justification to deny other Texans, including members of the LGBT community, equal access to goods and services and opportunities to participate in society. I have supported narrowly tailored legislation, such as Senate Bill 24 (2017), which you authored, relating to a privilege from disclosure to governmental units for certain evidence concerning sermons delivered by a religious leader, to ensure persons are able to follow their conscience without fear of government intrusion.

This committee report, however, identifies more general areas for potential legislation, specifically decisions involving employment, housing, adoption, foster care, counseling, and provisions of goods and services. Allowing persons to use religious beliefs in these areas as a pretext to treat other persons unfairly due solely to their sexual orientation, military status, marital status, or gender identity, would be a failure by the Legislature to achieve a proper balance that protects the rights of all Texans.

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Thank you for your dedication to the many important issues we examined during the 85th Interim. I look forward to continuing to work with you and other members of the committee during our next legislative session.

May God bless you.

Very truly yours,

Judith Zaffirini

Judith Zaffirini

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Interim Charges

The Senate State Affairs Committee is charged with conducting a thorough and detailed study of the following issues, and preparing recommendations, when appropriate, to address problems or issues that are identified.

1. **Natural Disaster Government Interaction:** Review the interaction between federal, state, and local agencies in charge of responding to natural disasters. Examine emergency situation operations, including evacuation routes and procedures, and the efficient use of Disaster Recovery Centers. Make recommendations to ensure emergency management officials have the tools and authority necessary to promptly and appropriately respond to disaster areas and alert citizens to potential threats.

2. **Natural Disaster Source of Information:** Study and make recommendations on the benefit of the state maintaining a single, web-based source of comprehensive information that outlines the State Emergency Operations during times of disaster.

3. **Price Gouging:** Review the Attorney General's efforts related to price gouging and identify existing issues with current law, if any, that could be remedied to further protect Texans during times of disaster.

4. **Looting Crimes:** Review laws related to looting crimes. Examine whether current penalties and enhancements are sufficient to deter looting crimes during disaster.

5. **Second Amendment:** Review local ordinances imposed on sellers and venues that affect a person's rights under the Second Amendment of the United States Constitution. Examine state and local regulations and restrictions regarding the carrying of weapons during a natural disaster. Make recommendations on whether any legislation is needed to address the regulatory barriers to the full exercise of the Second Amendment rights of citizens.

6. **Pensions:** Examine and assess public pension systems in Texas. Specifically, review and assess: (1) the different types of retirement plans; (2) the actuarial assumptions used by retirement systems to value their liabilities and the consequences of amending those assumptions; (3) retirement systems' investment practices and performance; and (4) the adequacy of financial disclosures including asset returns and fees. Make recommendations to ensure public pension system retirees' benefits are preserved and protected.

7. **Attorney General Jurisdiction:** Examine the Attorney General's jurisdiction on issues of alleged violations of state laws regarding abortion and multi-jurisdictional human trafficking cases. Make recommendations to ensure uniform enforcement across the state.

8. **Court Fees:** Examine the structure of court fees and make recommendations to ensure statutory filing fees and court costs are appropriate and justified. Provide recommendations for proper agency oversight of fee collection.

9. **Campus Free Speech:** Ascertain any restrictions on freedom of speech rights that Texas students face in expressing their views on campus along with freedoms of the press, religion, and assembly. Recommend policy changes that protect First Amendment rights and enhance the free speech environment on campus.

10. **Religious Liberty:** Monitor the implementation of legislation that protects citizens' religious freedoms, including Senate Bill 24 (sermon safeguard) and House Bill 555 (religious liberty of county clerks), and make recommendations for any legislation needed to ensure that citizens' religious freedoms are not eroded by local ordinances or state or federal law.

11. **Monitoring Charge:** Monitor the implementation of legislation addressed by the Senate Committee on State Affairs, 85th Legislature, Regular Session, and make recommendations for any legislation needed to improve, enhance, and/or complete implementation. Specifically, monitor the following: 1) implementation of Senate Bill 2190, relating to the public retirement systems of certain municipalities; 2) implementation of House Bill 3158, relating to the retirement systems for and the provision of other benefits to police and firefighters in certain municipalities; 3) implementation of House Bill 3976, relating to the administration of and benefits payable under the Texas Public School Retired Employees Group Benefits Act; and 4) implementation of Senate Bill 16, relating to decreasing the fee for the issuance of a license to carry a handgun.

Senate Committee on State Affairs Interim Hearings

October 25, 2017, *Senate Chamber*
The Committee took invited and public testimony on Charge Nos. 1 & 2.

January 31, 2018, *Texas State University*
The Committee took invited and public testimony on Charge No. 9.

February 21, 2018, *Senate Chamber*
The Committee took invited and public testimony on Charge Nos. 7 & 10.

April 4, 2018, *Senate Chamber*
The Committee took invited and public testimony on Charge Nos. 6, 11(1), 11(2) & 11(3).

September 10, 2018, *Senate Chamber*
The Committee took invited and public testimony on Charge Nos. 3, 4 & 8.

Interim Charge Discussions and Recommendations

Charge No. 1

Natural Disaster Government Interaction: *Review the interaction between federal, state, and local agencies in charge of responding to natural disasters. Examine emergency situation operations, including evacuation routes and procedures, and the efficient use of Disaster Recovery Centers. Make recommendations to ensure emergency management officials have the tools and authority necessary to promptly and appropriately respond to disaster areas and alert citizens to potential threats.*

Background

Many regions of the country are prone to multiple hazards. Texas itself is vulnerable to flooding, hurricanes, tornados, wild fires, winter weather, and even earthquakes. In fact, the state of Texas has more major disasters than any other state in the nation.[1] Under Texas law, a major disaster is defined as an occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or man-made cause.[2] The Texas governor is granted the legal authority to declare a state of disaster through an executive order or proclamation. The declaration of a major disaster by the governor activates the disaster recovery and rehabilitation aspects of the state emergency management plan, authorizes the deployment and use of any forces to which the plan applies, and allows the use or distribution of any supplies, equipment, materials, or facilities. The governor also becomes the commander-in-chief of all state agencies, boards, and commissions having emergency responsibilities and is granted the authority to suspend the provisions of any regulatory statute or state agency rule, if strict compliance would prevent or hinder response efforts.[3]

Under federal law, a major disaster is defined as any natural catastrophe, fire, flood, or explosion determined by the President of the United States to warrant additional resources of the federal government to alleviate the damages or suffering caused by the event. The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) sets forth the system by which a presidential disaster or emergency declaration triggers financial and physical assistance through the Federal Emergency Management Agency (FEMA).[4]

The Stafford Act provides that the governor of an affected state must first execute the state's emergency management plan before requesting a presidential declaration. Additionally, the governor must certify in writing that the magnitude of the event exceeds the state's capability to respond and that supplemental federal assistance is necessary.[5] Upon the declaration by a president of a major disaster, the president then must appoint a federal coordinating officer to assist in the affected area. This coordinating officer will make initial appraisals regarding the types of relief most needed, establish assistance field offices, and coordinate the administration of relief among nonprofit organizations and federal, state, and local governments. The president must also form emergency

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[1] *Natural Disaster Government Interaction Charge: Hearing Before the S. Comm. on State Affairs*, 2017 Leg., 85th Interim (Tex. 2017) (testimony of Nim Kidd, Tex. Dep't of Pub. Safety- Tex. Div. of Emergency Mgmt.).
[2] TEX. GOV'T CODE § 418.004.
[3] TEX. GOV'T CODE §§ 418.014 - 418.016.
[4] 42 U.S.C. § 5121.
[5] *Id.*

support teams staffed with federal personnel. These support teams are sent to affected areas to help the federal coordinating officer carry out his or her responsibilities.[6]

Three types of federal assistance are authorized under the Stafford Act. The first is individual assistance, by which the federal government provides direct financial assistance to individuals for food, shelter, and other disaster related needs. The second is hazard mitigation, by which the federal government provides grants to affected governments to implement long-term hazard mitigation measures after a major disaster declaration. Finally, the federal government offers direct public aid to eligible local and state governments or nonprofit organizations seeking assistance.[7] The Stafford Act has provided direct assistance to hundreds of thousands of individuals impacted by disasters since its inception.

At the state level, the Texas Division of Emergency Management (TDEM) coordinates the state emergency management program, which is intended to ensure the state and local governments respond to and recover from emergencies and disasters, and implements plans and programs to help prevent or lessen the impact of emergencies and disasters.[8] TDEM was created in 1975 and is a division of the Department of Public Safety (DPS). The authority of TDEM is derived from the powers of the governor as laid out in Chapter 418 of the Texas Government Code. TDEM coordinates emergency planning, provides an extensive array of specialized training for emergency responders and local officials, and administers disaster recovery and hazard mitigation programs in the state of Texas.[9] Furthermore, TDEM is charged with carrying out a comprehensive all-hazard emergency management program for the state and for assisting cities, counties, and state agencies in planning and implementing their emergency management programs. A comprehensive emergency management program includes pre- and post-disaster mitigation of known hazards to reduce their impact; preparedness activities, such as emergency planning, training, and exercises; provisions for effective response to emergency situations; and recovery programs for major disasters. Finally, TDEM administers the disaster contingency fund in conjunction with the governor, as well as the statewide mutual aid system.[10]

Each political subdivision is within the jurisdiction of, and served by, TDEM. It is the responsibility of each political subdivision to prepare and continuously update an emergency management plan for its jurisdiction, providing for disaster mitigation, preparedness, response, and recovery.[11] The governor determines which home-rule cities need to develop their own emergency management program or recommends certain cities and counties to develop interjurisdictional programs.[12] The presiding officer of each political subdivision shall notify TDEM of the manner in which the political subdivision is providing or securing an emergency management program and identify the person responsible for the program, known as the emergency management director.[13] Per state law, the emergency management director for a political subdivision is the presiding officer of the governing body of an incorporated city or county or the chief administrative officer of a joint board. An emergency management director serves as the governor's designated agent in the supervision of a

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[6] *Id.*
[7] *Id.*
[8] *Texas Div. of Emergency Mgmt.*, TEX. DEP'T OF PUB. SAFETY, https://www.dps.texas.gov/dem/about.htm (last visited Aug. 6, 2018).
[9] *Id.*
[10] TEX. GOV'T CODE §§ 418.041 - 418.043.
[11] TEX. GOV'T CODE § 418.106.
[12] TEX. GOV'T CODE §§ 418.103 - 418.105.
[13] TEX. GOV'T CODE § 418.101.

major disaster, administration of recovery, and may exercise the powers granted to the governor in an emergency on an appropriate local scale.[14]

A local or interjurisdictional emergency management plan is activated upon the declaration of a local state of disaster by the presiding officer of a political subdivision. Specifically, the declaration of a local disaster initiates the appropriate recovery and rehabilitation aspects of all applicable local or interjurisdictional emergency management plans and authorizes the furnishing of aid and assistance under the declaration.[15] Additionally, the presiding officer of a political subdivision, usually the mayor or county judge, may order and enforce a mandatory evacuation of all or part of the population in the area under their jurisdiction. The governor may also recommend an evacuation, but may only enforce a mandatory evacuation if it occurs in concurrence with the appropriate local presiding officer.[16]

Discussion

Hurricane Harvey

On August 17, 2017, Hurricane Harvey was officially named by the National Hurricane Center. On August 23, Governor Greg Abbott issued a disaster proclamation for 30 Texas counties and raised the threat level of the State Operations Center of the Emergency Management Council. By the next day, the State Operations Center was operational 24/7.[17] In collaboration with the State Operations Center, the Texas Department of Transportation's (TxDOT) Emergency Operations Center and Hurricane Response & Re-Entry Plan were activated.[18] Then, on August 25, Hurricane Harvey made landfall on the Texas coastline as a Category 4 hurricane. Earlier that same day, the Governor requested and received a Presidential Disaster Declaration for the state of Texas and six Texas counties. An additional 47 counties were eventually added to the federal disaster declaration making this one of Texas' most destructive natural disasters in history.

By federal law, there is a financial threshold an individual state must meet before the president can grant a major disaster declaration. Specifically, FEMA uses a per capita amount as an indicator that a disaster warrants federal assistance and adjusts this figure annually based on the Consumer Price Index. At the time of Hurricane Harvey, the state per capita amount was $1.46. Based on the 2010 Texas census, the state's threshold for triggering a presidential disaster declaration was $37 million of uninsured public loss or expenses. This would include such items as debris generated, first responders' overtime, sheltering operations, road and bridge damage, public property damage, etc. Because of its population, Texas currently has the second highest threshold in the country; second only to California. Since the 1950s, Texas has had more federal disaster declarations than any other state.[19]

Individual counties must also meet a certain threshold of damage before becoming eligible for federal assistance. At the time of Hurricane Harvey, that threshold was $3.56 per capita for each Texas county. As a result, even though the governor declared a disaster declaration for 60 counties, the

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[14] TEX. GOV'T CODE § 418.1015.
[15] TEX. GOV'T CODE § 418.108.
[16] TEX. GOV'T CODE §§ 418.108, 418.185.
[17] *See supra* note 1.
[18] *Natural Disaster Government Interaction Charge: Hearing Before the S. Comm. on State Affairs*, 2017 Leg., 85th Interim (Tex. 2017) (testimony of Michael Lee, Tex. Dep't of Transp.).
[19] *See supra* note 1.

presidential declaration only applied to 53 counties because some did not meet the federal financial threshold.[20] As Texas' population continues to grow rapidly, the threshold to receive federal financial assistance during times of disaster, both at the state and local level, will likely increase putting more of the financial burden on the state of Texas and its local governments.[21] Knowing this, the Texas Legislature and local governments must plan accordingly to ensure there is adequate funding for future disasters.

Communication, Coordination, & Response

The preparation and response to Hurricane Harvey was unprecedented. Despite some minor obstacles and a few localized events, the communication systems and coordination between federal, state, and local entities proved successful. As previously mentioned, coordination among the different levels of government prior to the storm making landfall helped jumpstart the recovery process. In the immediate aftermath, communication and coordination continued to play a vital role in serving the needs of Texans impacted by the destruction of Hurricane Harvey. For example, the state worked with the federal government to secure fuel waivers from the Environmental Protection Agency and Department of Energy to avoid a fuel shortage. Furthermore, the governor negotiated a cost-share wavier with FEMA that drastically reduced the financial impact at the state and local levels.[22] Specifically, the governor negotiated a historic division of public financial assistance with a federal share of 90 percent and 10 percent state share. Traditionally, the share of costs during the aftermath of disasters among the federal and state government has been 75 percent to 25 percent, respectively.[23] Because of the efforts by all levels of government to support Texans in need, resources were quickly dispersed and government officials focused on directly serving their constituents and not wasting time haggling over finances.

Seamless communication between TDEM, the Office of the Governor, state agencies, and local officials was vital to the preparation and recovery efforts. DPS, Texas Taskforce 1 & 2, Texas Military Department, Texas Parks & Wildlife Department, local law enforcement, and members of FEMA performed tens of thousands of rescue and evacuation operations. These rescue operations were the top priority of government officials and required a unified approach among the government entities. Additionally, in the immediate aftermath, a high level of coordination ensured that communities received food, water, and other vital supplies.[24] FEMA also worked closely with local governments to establish disaster recovery centers. In order to find adequate facilities, FEMA asks mayors and county judges to find free, available space that is the right size, ADA-compliant, clean, secure, has plenty of parking, and has access to the internet and telephone lines. Once those locations are identified, FEMA executes a no-cost lease and brings in federal personnel. In order to staff the recovery centers, FEMA puts out a request to federal employees to take a 45-day deployment from their regular jobs. For example, there were federal Transportation Security Administration workers from the San Diego airport staffing disaster recovery centers in Texas following Hurricane Harvey. While delays in setting up disaster recovery centers are to be expected given the monumental task of preparing these facilities, many disaster victims suffer during the transitional period before FEMA arrives.[25] In the wake of Hurricane Harvey, Fort Bend County was forced to hire their own social

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[20] *Id.*
[21] *Id.*
[22] *Natural Disaster Government Interaction Charge: Hearing Before the S. Comm. on State Affairs*, 2017 Leg., 85th Interim (Tex. 2017) (testimony of Reed Clay, Off. of the Governor).
[23] *See supra* note 1.
[24] *See supra* note 22.
[25] *See supra* note 1.

service caseworkers to try to fill the gap in social services between the end of the storm and the arrival of FEMA support.[26]

Coordination and communication with FEMA regarding federal public assistance dollars to state and local governments dramatically improved compared to previous disasters. As of October 25, 2017, 643 local governments and eligible nonprofits had submitted their initial applications to FEMA to be considered for public assistance. At the 30 day mark after Hurricane Harvey, FEMA had already funneled $300 million dollars into local Texas communities. By contrast, FEMA had only distributed $15 million at the 30 day mark after Hurricane Ike and only $32.9 million for Hurricane Rita.[27] Thus, it was clear that FEMA worked in concert with the state and local entities throughout the entire process after Hurricane Harvey.

Despite the seamless communication that occurred between multiple levels of government, there is still need for improvement. One unfortunate issue occurred with regard to the State of Texas Assistance Request (STAR) system. This system is designed to make it easier for political subdivisions affected by major disasters to obtain additional resources as quickly as possible. The STAR system is designed to allow a political subdivision to submit a request for resources that the state will then locate. The state then delivers the requested resources, provides reimbursement to the supplying agency, and finally, pursues federal reimbursement. Unfortunately, during Hurricane Harvey, the City of Houston (City) experienced a few problems acquiring needed resources through the STAR system. For example, due to extensive flooding, numerous traffic signal cabinets were damaged or destroyed and the City was in dire need of replacements. However, the City found that the STAR system did not deal with these types of resources. Furthermore, once a supply of traffic signal cabinets was located, the STAR system still rejected the request. However, the City did finally obtain the cabinets.[28] The STAR system was designed to improve the efficiency of delivering these requests and not further delay efforts, so this system must once again be reviewed to ensure better output the next time a major disaster strikes.

Another communication issue that presented itself during Hurricane Harvey was related to local government entities obtaining timely legal counsel. During, and immediately following the hurricane, the Office of the Attorney General (OAG) received numerous phone calls, emails, and other contacts from local jurisdictions and state agencies seeking legal guidance on various issues.[29] Texas Government Code Section 402.045 specifies that the OAG may not give legal advice, or a written opinion, to a person other than those specifically named in that subchapter, which are primarily state officials. Accordingly, the OAG is only allowed to provide legal advice to local officials in very limited circumstances, which typically include to a county or district attorney in matters before a court.[30] A number of legal issues often arise during times of disaster, many in which the local officials may not have any expertise. Thus, it would be beneficial for all parties, including the very constituents these local entities are trying to serve, for local entities to be able to seek outside legal counsel from the OAG in circumstances such as during times of a major disaster.

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[26] *Natural Disaster Government Interaction Charge: Hearing Before the S. Comm. on State Affairs*, 2017 Leg., 85th Interim (Tex. 2017) (testimony of Hon. Robert Hebert, Fort Bend Cnty.).
[27] *See supra* note 1.
[28] *Natural Disaster Government Interaction Charge: Hearing Before the S. Comm. on State Affairs*, 2017 Leg., 85th Interim (Tex. 2017) (written testimony of Jeffrey S. Weatherford, City of Houston).
[29] *Natural Disaster Government Interaction Charge: Hearing Before the S. Comm. on State Affairs*, 2017 Leg., 85th Interim (Tex. 2017) (written testimony of John Ellis, Tex. Off. of the Att'y Gen.).
[30] TEX. GOV'T CODE § 402.043.

Fully complying with Texas Government Code Chapter 552, known as the Public Information Act, also became challenging for local government entities immediately after the disaster. In fact, many government buildings were completely destroyed or inaccessible making it impossible for official business to be conducted. Furthermore, government records were destroyed or lost compounding the problem. Because local governments were operating sporadically, many sought guidance from the OAG. Local entities expressed concerns to the OAG regarding the deadlines in the Public Information Act and how those would apply during a response to a major disaster. Texas statute requires a governmental body to request a ruling from the attorney general within 10 days of receiving a request if it believes any of the information requested is exempt from public disclosure. The statute also requires the governmental entity to provide copies of the records or information it believes to be exempted within 15 days of such a request.[31] State law provides no exception to this rule, even when the local governmental entity is within the area of a declared disaster. In many cases, fully complying with the Public Information Act was simply not feasible given the dire circumstances. While transparency in government is critically important, governmental entities' top priority is always the safety and well-being of its constituents. Thus, it is critical that there is a balance in certain drastic situations, such as during a major disaster, where complying with certain regulations and laws does not stifle the ability of a governmental body to appropriately respond to such an emergency.[32]

Finally, Texas Government Code Chapter 551, the Open Meetings Act, presented a hurdle to swift and effective communication in certain circumstances within a governmental body. Many local governments found themselves unsure as to how the Open Meetings Act applies during the response to an emergency. Texas Government Code Section 551.002 provides that "[e]very regular, special, or called meeting of a governmental body shall be open to the public, except as provided by [law]." One of the exceptions does allow the public posting requirement to be shortened to two hours if an emergency exists whereby immediate action is required of the governmental body because of an imminent threat to public health and safety or a reasonably unforeseeable situation.[33] However, even with the shortened two hour posting requirement, decisions needed to be made more expediently or there was the potential for further loss of life. Many local officials found themselves restricted from potentially making life-saving decisions because of the Open Meetings Act. Similar to the Public Information Act, the Open Meetings Act rightfully serves to make government operations transparent to the public. That said, there still needs to be limited exceptions to ensure government officials have the tools necessary to protect their constituents from imminent danger. Limited exceptions could include situations where the governor has declared an emergency or major disaster for a certain area or where a governmental body is able to demonstrate that the disaster made the Open Meetings Act requirements unduly burdensome to the point where compliance would hinder the governmental body's ability to adequately respond to the emergency.[34]

Public Notifications & Evacuations

Disseminating accurate, up-to-date information to the public before, during, and immediately after a major disaster is a critical responsibility of the government, specifically with regard to emergency notifications. The authority to send out an emergency notification rests in the hands of local officials, including mayors and county judges. When emergency notification first started, it was by landline telephone. Working with 9-1-1 service providers and telephone companies, all landline phone

[31] TEX. GOV'T CODE § 552.301.
[32] *See supra* note 29.
[33] TEX. GOV'T CODE § 551.045.
[34] *See supra* note 29.

numbers were put into a government database. Local officials could then go to their emergency management coordinators and order that a certain segment of the population under their authority get a telephone call alerting them to a specific emergency situation. Unfortunately, this system was not capable of applying to cellular telephones; and thus, has since become nearly irrelevant as the vast majority of individuals no longer have a landline and only possess a cellular phone.[35]

Because technology has evolved quickly, so too has the emergency response systems. Today, Texas not only has the landline based system, but it also has a wireless notification system. The wireless notification system, however, requires the individual to specifically register in order to receive local emergency notifications. Because this new system requires a proactive step, many Texas communities do not have great participation in the program to receive these notifications.[36] Local communities must actively advertise these programs in hope that more cellular phone holders register for this potentially life-saving notification system.

At the federal level, FEMA has coordinated with the major cell phone providers to create its own cell phone notification system. This notification system allows for all cell phone users in a designated area to receive a specific message. Although this is certainly a positive step, the technology has not yet caught up to the system. It is still difficult to clearly draw lines between cell phone towers which often results in a "bleed over" to neighboring cell phone towers causing people in areas outside of the emergency area to receive alerts. This can result in further confusion and even frighten individuals when there is no cause to be alarmed.[37]

At the state level, TxDOT continuously notifies the public of road closures and changing weather conditions through newspapers, television, the internet, traffic control devices, and other methods. Furthermore, road condition information is available 24/7 on the DriveTexas.org interactive map, which provides accurate and up-to-date travel-related information to the traveling public. DriveTexas.org was critically important for residents, first responders, and government agencies during the preparation and response to Hurricane Harvey, as TxDOT updated road conditions in real-time. In fact, DriveTexas.org had more than 5.1 million visits before, during, and immediately after Hurricane Harvey. TxDOT also issued social media communications through Facebook and Twitter during emergency operations. Social media has become a popular medium to exchange ideas and messages that, if properly utilized, can be a useful tool for government officials during times of emergency. Another important resource is the TxDOT Travel Information phone line (800-452-9292), which is staffed by TxDOT during a disaster response. Recorded information on road conditions is also available on a 24-hour basis. The TxDOT Travel Information line received more than 163,000 calls during and after Harvey. Finally, TxDOT employed its network of more than 730 dynamic message signs across the state to convey up-to-date information about fuel and shelter and to alert the public about danger zones.[38] These are just some of the tools being utilized to ensure the public has the opportunity to be alerted to current conditions and potential threats.

During a major disaster, such as Hurricane Harvey, public notifications often include pertinent information regarding evacuations. While the decision to issue an evacuation is made at the local level, once it is given, the state authorities then assess and activate the most effective and safe evacuation methods. Evacuation methods utilized by TxDOT, in coordination with DPS, include

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[35] *See supra* note 1.
[36] *Id.*
[37] *Id.*
[38] *Natural Disaster Government Interaction Charge: Hearing Before the S. Comm. on State Affairs*, 2017 Leg., 85th Interim (Tex. 2017) (written testimony of Michael Lee, Tex. Dep't of Transp.).

directing traffic onto highway shoulders to be used as travel lanes, activating contraflows, supplying certain fuel stations with backup generators at regular intervals along evacuation routes, and coordinating with the gasoline industry to ensure the availability of fuel.[39]

Even when governmental authorities activate evacuation protocols, evacuations can still be challenging depending on the severity of the disaster. During Hurricane Harvey, many counties experienced such significant flooding that evacuations of some areas were virtually impossible. Montgomery County, for example, had over 200 road closures during the peak of the storm, including several state roads that serve as alternative evacuation routes.[40] In the wake of Hurricane Harvey, all levels of government are working to mitigate future evacuation challenges. TxDOT is evaluating roadways that have repeatedly flooded to determine if they could be improved to alleviate future flooding. TxDOT is also working with the Federal Highway Administration to receive funds from their emergency relief program to further improve infrastructure.[41] Federal funding would be greatly beneficial to vastly improve the state's infrastructure needs during times of a disaster. Given Texas' history and recent weather patterns, it is only a matter of time before the next emergency strikes and Texas must be more equipped and prepared to ensure it has the ability to respond efficiently and effectively.

Recommendations

Because of Texas' fast growing population, the financial threshold that triggers federal emergency assistance will likely increase to over $40 million. In light of this reality, the state must plan accordingly to ensure it has the necessary financial reserves to appropriately respond to disasters knowing that the cost to the state may be greater moving forward. Furthermore, the Governor's Disaster Contingency Fund has proven to be a vital mechanism for disaster relief efforts and is paramount to the state's quick response during a major disaster. Oftentimes, federal assistance may take months to fully receive; therefore, the legislature should ensure adequate funding remains for times of emergency when Texas citizens need assistance quickly.

The delay in getting federal disaster recovery centers up and running can be anywhere from one to two months. While some delays are understandable, many disaster victims suffer during the transitional period before FEMA arrives. Therefore, the state should consider increasing the funding of TDEM to allow for the employment of skilled recovery experts to enter a devastated area and work to mitigate suffering while FEMA ramps up its services. The state should also examine the possibility of establishing a network of social service agencies throughout the state that could rapidly deploy skilled professionals to initiate social services during the FEMA ramp up period.

Many problems resulted during Hurricane Harvey due to inconsistencies in inundation and flood maps leaving homeowners unadvised about potential flooding risks. Even if a homeowner does not reside in a flood zone, every structure is susceptible to flooding at some level. The legislature should examine efforts to require all residential maps to be updated to reflect current flooding models that clearly indicate the area's flood-risk level rather than its mere location in the floodplain. Although many areas of the state are not likely susceptible to flooding, homeowners should still be made aware of any potential flooding risks.

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[39] *Id.*

[40] *Natural Disaster Government Interaction Charge: Hearing Before the S. Comm. on State Affairs*, 2017 Leg., 85th Interim (Tex. 2017) (written testimony of Hon. Craig Doyal, Montgomery Cnty.).

[41] *See supra* note 38.

During Hurricane Harvey, the OAG received a number of requests from local jurisdictions seeking legal guidance on various issues. Getting answers to these issues and resolving them in a timely manner is critical during times of disaster. However, even during times of emergency, current Texas law strictly limits which parties the OAG may provide legal advice to. The legislature should review current restrictions and consider amending the Texas Government Code to enable the OAG to provide legal counsel to local jurisdictions during a disaster response. Ensuring that local officials have the tools necessary to appropriately respond to constituent requests is especially critical immediately following a major disaster.

The Public Information Act and Open Meetings Act also presented challenges for local officials attempting to coordinate and respond to the emergency in a timely manner. While transparency in government is important and must be preserved, governmental entities need to be able to focus on responding to emergencies without undue restrictions. The safety and well-being of Texas citizens must take priority in times of emergency. Although there are limited exceptions for disclosure of public information and of certain types of communication among elected bodies, there are no specific exceptions during times of disaster or emergency. Potential, very limited exceptions may include situations in which the governor has officially declared an emergency in certain jurisdictions to ensure these officials are able to focus on response efforts and do not become restricted by the Public Information Act or Open Meetings Act. These limited exceptions can still be crafted in a manner that retains transparency and does not enable governmental abuse. These exceptions should specifically include instances where the governmental body is able to demonstrate that the disaster made compliance with the Public Information Act or Open Meetings Act unduly burdensome or would hinder the governmental body's ability to adequately respond to the emergency. Clearer parameters regarding how governmental bodies are able to meet or communicate during a disaster would also enable more efficiency responding to these disasters.

Finally, the state's infrastructure, and potential evacuation routes, must continuously be evaluated by the appropriate agencies. The population of Texas continues to rise rapidly, leaving more and more Texans susceptible to experiencing a disaster or emergency. The roadways, bridges, dams, and waterways must be able to adequately support Texans, especially during times of disaster. Evacuation routes are critical immediately following a disaster and must be evaluated routinely. TxDOT must coordinate with the legislature to ensure the proper infrastructure exists to provide safe avenues for Texans to safely travel during evacuations. Although each disaster is inherently unique, each event also signifies a new learning opportunity that all levels of government must capitalize on to improve future response efforts.

Charge No. 2

Natural Disaster Source of Information: *Study and make recommendations on the benefit of the state maintaining a single, web-based source of comprehensive information that outlines the State Emergency Operations during times of disaster.*

Background

Disasters can strike at any time, often without notice. Trying to receive the most up-to-date information, identify an evacuation route, or locate a family member during a disaster can be challenging and overwhelming. There are dozens of sources to find pertinent information during times of disaster; however, these sources can be difficult to locate and navigate, even for the most technologically savvy individuals. Furthermore, many affected individuals cannot access these sources because there is no internet or telephone service available.

Typically, the first line of information during any disaster situation originates from local government officials. Local officials are generally the most informed about the situation in their jurisdiction and serve as the primary resource to the public. The primary duty of local officials is to ensure the safety and well-being of their constituents. Because of this responsibility, local officials work tirelessly before, during, and after disasters and emergency situations to keep the public informed and safe, typically through local media outlets. When necessary, local officials enlist support from their state and federal counterparts for assistance, including ensuring that the public remains knowledgeable about pending threats and the impact of those threats upon the community.

Governmental entities are not the sole source of information during times of disaster, however. Social media has become a vital source of information in disaster or emergency situations. Often, friends and neighbors communicating via social media may provide critical information about the current situation in the immediate area. Especially during times of disasters when communication with the outside world is cut off, communicating with neighbors can be the most effective network to learn more about potential threats and to find resources or assistance that may be needed immediately. Today, more than ever, sources of information arise from a multitude of mediums.

Discussion

During and after a disaster, it is critical that the public remains alert for changing hazards. Alert and warning systems, emergency radio, special sirens, and television broadcasts are useful tools to keep informed about hazards during and post-disaster. In fact, ensuring that the public is up-to-date and well informed can be life-saving for those directly impacted. Because of this, government officials from all levels strive to distribute comprehensive information that outlines state emergency operations during times of disaster.

For example, the Texas Division of Emergency Management (TDEM) implements programs to increase public awareness about threats and hazards.[42] TDEM's Operations Section manages and staffs the State Operations Center (SOC), located at the Department of Public Safety (DPS)

[42] *See supra* note 8.

Headquarters in Austin. SOC serves as the state warning point and primary state direction and control facility. It operates 24/7 to monitor threats, make notification of threats, provide information on emergency incidents to local, state, and federal officials, and coordinate state emergency assistance to local governments that have experienced an emergency situation that local response resources are inadequate to deal with. During major disasters or emergencies, the SOC management team, state agencies, volunteer groups that make up the state Emergency Management Council, and federal liaison teams convene at the SOC to identify, mobilize, and deploy state and volunteer group resources to respond to the emergency.[43]

The Operations Section is not just active during disasters though, it also oversees the Field Response Section and implements the Amber Alert Program for missing children, the Silver Alert Program for missing senior citizens, and the Blue Alert Program for individuals who have harmed law enforcement officers.[44] Thus, TDEM's Operations Section is a vital source of information for the public and has a proven track record of distributing essential information, including notification of alerts and potential threats, during times of disaster or emergency.

The Department of Information Resources (DIR) is another valuable source of information for Texans during times of disaster or emergency. DIR's mission is to provide technology leadership, solutions, and value to Texas state government, education, and local government entities to enable and facilitate the fulfillment of their core missions.[45] During times of disaster, DIR, through its management of the Texas.gov program, activates the disaster portal when the Governor's office declares a disaster and SOC increases activation levels.[46] DIR's disaster portal contains resources for the public pertaining to a variety of issues including temporary housing, licensing issues, insurance questions, law enforcement assistance, missing persons, consumer protection, and much more.[47] DIR's disaster portal provides a web-based source of comprehensive information that captures essential information in one location. However, this source of information is not widely utilized by the public largely in part because most Texans are not familiar with DIR and its disaster portal.

Road conditions and evacuation routes are critical pieces of information that must be easily accessible during times of disaster. To ensure the public has access to up-to-date information regarding road conditions, the Texas Department of Transportation (TxDOT) makes it a priority to effectively communicate emergency preparedness and response operations. As part of its emergency operations, TxDOT continuously notifies the public of road closures and changing weather conditions through newspapers, television, the internet, traffic control devices, and other methods. Online road condition information is available on the DriveTexas.org interactive map at www.DriveTexas.org.[48] DriveTexas.org provides accurate and up-to-date travel-related information to the traveling public. The website is helpful in a variety of conditions, including flooding and winter weather. DriveTexas.org was critically important for residents, first responders, volunteers, and government agencies during the preparation and response to Hurricane Harvey, as TxDOT updated

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[43] *Operations*, TEX. DEP'T OF PUB. SAFETY, https://www.dps.texas.gov/dem/Operations/index.htm (last visited Aug. 6, 2018).
[44] *Id.*
[45] *Mission and Philosophy*, TEX. DEP'T OF INFO. RESOURCES, http://dir.texas.gov/View-About-DIR/Pages/Content.aspx?id=45 (last visited Aug. 6, 2018).
[46] *Natural Disaster Source of Information Charge: Hearing Before the S. Comm. on State Affairs*, 2017 Leg., 85th Interim (Tex. 2017) (written testimony by Todd Kimbriel Tex. Dep't of Info. Resources).
[47] *Texas Disaster Preparedness*, TEXAS.GOV, https://emergency.portal.texas.gov (last visited Aug. 7, 2018).
[48] *Natural Disaster Source of Information Charge: Hearing Before the S. Comm. on State Affairs*, 2017 Leg., 85th Interim (Tex. 2017) (written testimony by Tex. Dep't of Transp.).

road conditions in real time. In fact, DriveTexas.org had more than 5.1 million visits before, during, and immediately after Hurricane Harvey.[49] TxDOT also issued social media communications through Facebook and Twitter during emergency operations. Often times, distribution of critical information through social media may be the most effective tool to reach the public in greater numbers.

Another important resource is the TxDOT Travel Information phone line (800-452-9292), which is staffed by TxDOT during a disaster response. Recorded information on road conditions is available on a 24-hour basis for those that may not have access to the internet. The TxDOT Travel Information phone line received more than 163,000 calls during and after Hurricane Harvey.[50] Furthermore, TxDOT employed its network of more than 730 dynamic message signs across the state's roadways to convey up-to-date information about fuel and shelter and to warn the public about danger zones.[51] Knowing that evacuation and rescue routes are so critical during times of disaster, TxDOT attempts to disseminate this information in real-time through a variety of mediums.

Finally, the Commission on State Emergency Communications (CSEC) is an agency of the state and is the state's authority on emergency communications. CSEC is charged with administering the State 9-1-1 Service Program and the Statewide Poison Control Program. CSEC consists of twelve members representing various public and private sector interests. Nine members are appointed by the Governor, Lieutenant Governor, and the Speaker of the House to represent cities, regional planning commissions, county government, emergency communications districts, and the general public. Three members are ex-officio, non-voting members named in statute.[52]

CSEC was created by the 70th Texas Legislature in 1987 to implement and administer 9-1-1 services throughout the state.[53] At that time, certain 9-1-1 emergency communications districts (ECD) and 9-1-1 ECD Municipalities were providing 9-1-1 service within their boundaries.[54] In order to provide 9-1-1 service to all citizens of Texas, CSEC implemented service to the remainder of the state with a program administered through the twenty-four Regional Planning Commissions (RPC).[55] Areas not being provided 9-1-1 service at that time were provided 9-1-1 service through their applicable RPC.[56]

As of May 15, 2014, the four largest wireless carriers (AT&T, Verizon, Sprint, and T-Mobile) have voluntarily made available text-to-911 upon request by the Public Safety Answering Points (PSAPs).[57] Because of this, CSEC has adopted policies and instructions for the implementation of text-to-911 to ensure consistency in implementation.[58] The 9-1-1 Regions will be responsible for requesting and implementing text in the 350 PSAPs in the CSEC program administered by the RPCs.[59] This is just one more tool for those individuals directly impacted by a disaster or in an emergency situation.

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[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *About the Commission*, COMM'N ON STATE EMERGENCY COMMC'N, https://www.csec.texas.gov/s/?language=en_US&tabset-fa183=2 (last visited Aug. 8, 2018).
[53] *9-1-1 Program*, COMM'N ON STATE EMERGENCY COMMC'N, https://www.csec.texas.gov/s/9-1-1-program?language=en_US (last visited Aug. 8, 2018).
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Text-to-911*, COMM'N ON STATE EMERGENCY COMMC'N, https://www.csec.texas.gov/s/9-1-1-program?language=en_US&tabset-634e4=7cd7e (last visited Aug. 8, 2018).
[58] *Id.*
[59] *Id.*

As technology develops, there are future opportunities to improve the network of communications during times of disaster or emergency. One innovative new instrument is the First Responder Network Authority (FirstNet), which is an independent authority within the United States Department of Commerce. The organization's mission is to develop, build, and operate a nationwide, broadband network for first responders. The nationwide public safety broadband network (NPSBN), commonly referred to as FirstNet, is a public/private federal program that hopes to provide a wireless broadband network for first responders.[60]

FirstNet offers a digital communication tool for first responder teams to communicate with one another in the field, and receive important information from 9-1-1 call centers.[61] FirstNet aims to provide seamless, mobile broadband communication among public safety responder agencies.[62] Through the FirstNet network, emergency dispatchers will be able to securely share critical information about the scene of an incident, such as building layouts, potential injuries, photos, videos, and real-time updates. This is just one example of a tool being developed to enable better communication and collaboration among public safety agencies during times of disaster or emergency. Many public and private entities around the world are embracing these technological developments and pursuing innovative ways to ensure that every citizen has the ability to learn comprehensive information during times of disaster.

Recommendations

Even though government officials work around the clock to serve Texas citizens, unforeseeable obstacles during times of disaster or emergency may lead to breakdowns in communication between government officials and the general public. Because each disaster is unique and presents its own challenges, a single, web-based source of comprehensive information that outlines State Emergency Operations may be extremely helpful for citizens that are directly, and even indirectly, affected by the disaster.

Although multiple state agencies already post pertinent information online and disseminate this information through various media outlets, there is no single location that details comprehensive disaster information such as evacuation routes, temporary housing options, licensing issues, insurance questions, law enforcement assistance, missing persons, consumer protection issues, public safety alerts, and other critical information that members of the public may desperately need. Because DIR already activates its disaster portal under the Texas.gov program when the Governor's office declares a disaster, DIR may be in the best position to proficiently and effectively manage a single, web-based source of information that outlines State Emergency Operations during times of disaster. DIR currently has the technology, expertise, and resources to efficiently manage and operate a new web-based source of information for Texans citizens. Because it is critical to inform the public during times of disaster and emergency, this disaster portal could also be expanded to cover all major emergencies that pose a public safety threat. Natural disasters are not the only events that threaten public safety. To ensure success of this comprehensive disaster portal, it is essential that DIR consult with local officials regarding the most efficient manner to operate. Should DIR successfully

[60] TEXAS A&M UNIVERSITY, CONNECTING THE TEXAS CSEC EMERGENCY SERVICES IP NETWORK (ESINET) TO FIRSTNET 2 (2017) [hereinafter FirstNet White Paper], *available at* https://csec.app.box.com/s/qfybjuv6suxv1tmabp8v6zcbhk96wq4q.
[61] *FirstNet Facts*, FIRSTNET, https://firstnet.gov/facts (last visited Aug. 8, 2018).
[62] *Id.*

implement this new portal that is capable of utilizing information disseminated by local officials, local and state officials must promote and educate the public about this resource to ensure it is fully utilized.

DIR must coordinate with local officials when managing this web-based portal. Local officials will always be the front line of information in disaster and emergency situations; therefore, it is critical that DIR work in tandem with these officials to ensure information is transmitted seamlessly to the public in the most timely manner possible. Although DIR cannot force local officials to participate in the coordination of this disaster portal and information sharing, local officials should utilize all available avenues to provide valuable information to their constituents. A single, web-based source of comprehensive information that outlines State Emergency Operations during times of disaster and emergency, managed by DIR, may become a valuable and useful instrument government officials have to effectively communicate with their constituents.

Charge No. 3

Price Gouging: *Review the Attorney General's efforts related to price-gouging and identify existing issues with current law, if any, that could be remedied to further protect Texans during times of disaster.*

Background

Price gouging is a term that refers to the practice of raising the price of goods, services, or commodities, to an unreasonable or unfair level. Such an increase in price is often a result of a sudden increase of demand and shortage of goods, such as in the event of a natural disaster or other crisis. The most common items affected by price gouging include food, water, gasoline, and medications. Services such as plumbing repair, heating repair, roofing repair, and others desperately needed in a state of emergency are also subject to price gouging.

While many states have price gouging laws to protect consumers, there are no federal laws regulating this practice. As of 2016, 34 states have enacted price gouging laws.[63] A handful of states impose criminal charges on top of civil liability when a business is found guilty of price gouging, though most give prosecutors broad discretion whether to pursue criminal charges. Penalties for price gouging also vary widely depending on the jurisdiction.[64] Price gouging laws have been held as constitutional, as law enforcement authorities and local governments have the authority to preserve order and protect the common good during an emergency.[65]

Price gouging is illegal in Texas, and the Office of the Attorney General (OAG) has authority to prosecute any business that engages in price gouging after a disaster has been declared by the governor. A disaster declaration triggers heightened enforcement authority for the OAG under the Texas Deceptive Trade Practices Act. This authority protects Texans by prohibiting exorbitant prices for necessities, such as drinking water, food, batteries, and generators. Although state law prohibits vendors from illegally raising prices to reap exorbitant profits during a disaster, it does allow retailers to pass along wholesale price increases to customers. Thus, in some cases, increased prices may not necessarily signal illegal price gouging.[66]

Section 17.46(b) of the Texas Deceptive Trade Practices-Consumer Protection Act provides that it is a false, misleading, or deceptive act or practice to take advantage of a disaster declared by the governor under Chapter 418, Government Code, by:

1. Selling or leasing fuel, food, medicine, or another necessity at an exorbitant or excessive price; or
2. Demanding an exorbitant or excessive price in connection with the sale or lease of fuel, food, medicine, or another necessity.[67]

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[63] *Price Gouging*, LEGAL DICTIONARY, https://legaldictionary.net/price-gouging/.
[64] *Id.*
[65] *Id.*
[66] *Disaster Declaration Extended; Report Price Gouging to Complaint Hotline*, TEX. ATT'Y GEN, https://www.texasattorneygeneral.gov/alerts/alerts_view_alpha.php?id=205&type=1.
[67] *Price Gouging*, TEX. ATT'Y GEN, https://texasattorneygeneral.gov/cpd/price-gouging.

In Texas, offenders who engage in price gouging can face fines of up to $20,000 per offense, and up to $250,000 if the victim is 65 or older.[68] However, the totality of the circumstances must be considered before determining the legitimacy of a price gouging claim. For example, the current high price of gasoline may be the result of a number of factors, including the cost of crude oil. The price at the pump also includes how much it costs to deliver oil from the refineries, the refining cost, distribution cost, taxes, and the retail station's operating cost. Therefore, when major storms like Hurricanes Katrina, Rita, and Harvey damage the Gulf Coast's refining capacity, prices can rise even higher. In most cases, the current price at the pump is not due to price gouging.

Discussion

As Hurricane Harvey approached the Texas coast last year, Governor Greg Abbott declared a state of disaster activating the provision of the Texas Deceptive Trade Practices Act that makes price gouging illegal. Price gouging is not unusual in the wake of large natural disasters, like Hurricane Harvey. During, and immediately after, Hurricane Harvey, sustained high gasoline prices prompted many price gouging complaints across the state. In fact, the OAG received thousands of complaints about inflated prices at gasoline pumps. Some complaints illustrated the frustration from gasoline prices skyrocketing between August 30, 2017 and September 6, 2017, as many people rushed to fill up their vehicles, afraid gas would run out.[69] Many Texans even sent photos and receipts to the OAG as evidence.

The OAG immediately initiated investigations to ensure consumers, especially those directly affected by the hurricane, were not subject to these criminal acts. Although the overall number of complaints seems exorbitant, after a thorough evaluation and investigation process, the OAG determined that a very large portion of the complaints were duplicative.[70] The OAG discovered that out of all the complaints, 227 were related to contracting services, while 213 of the complaints were related to hotel services.[71] The Consumer Protection Division of the OAG initially sent out 127 letters to businesses that appeared to be potentially engaging in price gouging.[72] The letters urged the businesses to come forward and resolve the issue with the OAG before a lawsuit was filed against them.[73]

Texas statute specifies that the individual or business must be taking advantage of a declared disaster by selling or leasing fuel, food, medicine, or another necessity at an "exorbitant or excessive price."[74] This is a fairly subjective standard. However, when evaluating whether or not a business engaged in price gouging, the OAG considers a variety of objective factors such as the price timeline for the product or service; what the actual price was in the industry at the time; what costs the business was incurring; and other similar variables.[75] In addition to the 127 initial letters the OAG sent out, it also issued 229 civil investigative demands to obtain more information in order to access if the business engaged in price gouging and the scope of how many consumers may have been affected and the

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[68] *Id.*

[69] Anna M. Tinsley, *Did You Get Ripped Off When Gas Prices Soared During Harvey? You're Not Alone*, FORT WORTH STAR-TELEGRAM (Sept. 12, 2017), https://www.star-telegram.com/news/local/community/fort-worth/article172810981.html

[70] *Price Gouging Charge: Hearing Before the S. Comm. on State Affairs*, 2018 Leg., 85th Interim (Tex. 2018) (oral testimony by Kris Kennedy, Deputy Chief, Consumer Protection Div., Office of the Tex. Att'y Gen.).

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] TEX. BUS. & COM. CODE § 17.46(b)(27)(A).

[75] *Id.*

dollar amounts implicated.[76]

Recently, the OAG Consumer Protection Division finalized settlements with 52 Texas gas stations accused of price gouging during the state of disaster declared for Hurricane Harvey.[77] Six to eight more settlements are currently being finalized.[78] Under separate agreements, these businesses will pay $180,000 in civil restitution to refund Texans who were charged exorbitant or excessive prices for gasoline.[79] The amount of restitution was calculated by finding the difference between what consumers should have been charged and the spiked price actually charged.[80] All 52 gas stations that settled with the OAG charged $3.99 or higher for a gallon of gasoline or diesel.[81] Some stations allegedly charged as much as $9.99 for gas at the time of the declared disaster.[82] Furthermore, as part of the settlements, each business agreed to an assurance of voluntary compliance and also to pay restitution to consumers.[83] These "assurances of voluntary compliance" are an important part of the settlement process as they lay out what a future violation would be and preemptively enjoin these businesses from further price gouging in the event of another disaster.[84]

Ironically, none of the 52 gas stations that settled with the OAG is in the hurricane-struck region. Instead, 42 of them were in the Dallas-Fort Worth area and the others in central Texas.[85] Gas stations listed in the settlement included: 13 in Dallas, 12 in Fort Worth, 4 in Garland, 2 in Richardson, 2 in Haltom City, and various other stations in North Richland Hills, Addison, Denton, Lancaster, Grand Prairie, and Irving.[86]

In addition to the 52 settled matters, the OAG is also actively pursuing five litigation matters.[87] Of these five, four are against gas stations, and one is against a hotel.[88] The litigation matters were instantly filed after Hurricane Harvey due to the egregiousness of the businesses' price gouging. The OAG is seeking severe civil penalties against these five businesses to deter other businesses from engaging in similar behavior in the future. The OAG has made it clear to businesses across the state that it will not enable Texas businesses to subject consumers to these criminal acts during times of a disaster.

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[76] *Price Gouging Charge: Hearing Before the S. Comm. on State Affairs*, 2018 Leg., 85th Interim (Tex. 2018) (oral testimony by Amanda Cochran-McCall, Assoc. Deputy for Civ. Litigation, Office of the Tex. Att'y Gen.).
[77] *AG Paxton: 48 Texas Gas Stations Agree to Refund Consumers for Hurricane Harvey Price Gouging*, TEX. ATT'Y GEN, https://www.texasattorneygeneral.gov/news/releases/ag-paxton-48-texas-gas-stations-agree-to-refund-consumers-for-hurricane-har; *Price Gouging Charge: Hearing Before the S. Comm. on State Affairs*, 2018 Leg., 85th Interim (Tex. 2018) (oral testimony by Amanda Cochran-McCall, Assoc. Deputy for Civ. Litigation, Office of the Tex. Att'y Gen.).
[78] *Price Gouging Charge: Hearing Before the S. Comm. on State Affairs*, 2018 Leg., 85th Interim (Tex. 2018) (oral testimony by Amanda Cochran-McCall, Assoc. Deputy for Civ. Litigation, Office of the Tex. Att'y Gen.).
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] Michael Giberson & Halea Walker, *A Texas Price-Gouging Law is Backfiring*, DALLAS NEWS, https://www.dallasnews.com/opinion/commentary/2018/08/20/texas-price-gouging-law-backfiring.
[86] Marjorie Owens, *Texas Gas Stations to Pay Out $167K for Price Gouging During Hurricane Harvey*, WFAA (July 5, 2018), https://www.wfaa.com/article/news/local/texas-news/texas-gas-stations-to-pay-out-167k-for-price-gouging-during-hurricane-harvey/287-570967452.
[87] *Price Gouging Charge: Hearing Before the S. Comm. on State Affairs*, 2018 Leg., 85th Interim (Tex. 2018) (oral testimony by Amanda Cochran-McCall, Assoc. Deputy for Civ. Litigation, Office of the Tex. Att'y Gen.).
[88] *Id.*

Recommendations

The OAG's Consumer Protection Division took an aggressive approach to processing and investigating the thousands of complaints it received during and after Hurricane Harvey. The OAG efficiently sorted through the complaints and investigated each submission with due diligence. However, overall, businesses in the community treated Texans fairly in the wake of the disaster. Because future disasters are inevitable in Texas, the legislature must continue to ensure that the OAG has the tools and resources necessary to educate businesses and properly enforce the consumer protection laws, including the price gouging statute. These consumer protection laws are critical for Texans who may be struggling to survive in the wake of a life-altering disaster.

Charge No. 4

Looting Crimes: *Review laws related to looting crimes. Examine whether current penalties and enhancements are sufficient to deter looting crimes during disaster.*

Background

Looting refers to opportunistic crimes committed during, or in the wake of, a catastrophe. In the aftermath of natural disasters, certain individuals take advantage of the situation by looting businesses and homes that were evacuated as a result of the disaster. The Texas Penal Code does not specifically provide for a criminal charge called "looting." Instead, when crimes such as burglaries, thefts, robberies, and assaults happen in declared disaster areas, the criminal charges may be enhanced. This means that the penalties for committing these crimes in the wake of a disaster could be more severe.

The enhancement statute is codified as Texas Penal Code § 12.50 (Penalty if Offense Committed in Disaster Area or Evacuated Area).[89] Under this section, added by Senate Bill 359 of the 81st Legislative Session, the penalty for four different offenses– assault, robbery, burglary, and theft– is increased to a heightened offense if the crime was committed in a declared disaster area.[90] This legislation was passed in the aftermath of Hurricane Ike, which struck Texas in 2008.[91]

As an example of how this enhancement statute might be used, Harris County prosecutor David Mitcham states that in the event that an individual burglarizes a habitation and the crime would typically be charged as a second degree felony, the charge could be "enhanced" up to a first degree felony.[92] It is important to note that under subsection (d) of § 12.50, necessity is a defense to an enhancement charge for certain crimes committed during a disaster. Therefore, if an individual who reasonably believed their conduct was immediately necessary to avoid imminent harm could purportedly qualify for a "necessity justification."[93]

Looting became a subject of discussion in Texas immediately before, during, and after Hurricane Harvey hit landfall in 2017. When Houston officials became aware of the threat of the imminent hurricane, they warned citizens of looting and promised stiff punishments for anyone who chose to take advantage of the disaster.[94] In fact, Mayor Sylvester Turner imposed a midnight to 5:00 a.m. curfew in an effort to preempt opportunistic crimes such as looting. The curfew exempted flood relief volunteers, those seeking shelter, first responders, and those commuting to or from work.[95] Furthermore, Houston Police Chief Art Acevedo sent out a stern message to any would-be criminals, stating, "We're going to push hard to make sure you don't see the sunlight anytime soon."[96] Chief Acevedo also stated at a press conference that while Houston is a city that is "about diversity and

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[89] TEX. PENAL CODE § 12.50.
[90] *Looting Charge: Hearing Before the S. Comm. on State Affairs*, 2018 Leg., 85th Interim (Tex. 2018) (written testimony by Shannon Edmonds, Dir. of Gov't Relations, TDCAA).
[91] *Id.*
[92] Joel Eisenbaum, *These 20 People are Accused of Looting During Hurricane Harvey*, CLICK2HOUSTON (Nov. 14, 2017), https://www.click2houston.com/news/these-20-people-are-accused-of-looting-during-hurricane-harvey.
[93] TEX. PENAL CODE § 9.22.
[94] Stephen Paulsen, *A Look at the Looters of Hurricane Harvey*, HOUSTON PRESS (Oct. 23, 2017), https://www.houstonpress.com/news/a-look-at-looting-arrests-during-hurricane-harvey-9896109
[95] Merrit Kennedy, *In Houston, Authorities Are Toughening Penalties as Warning to Would-be Looters*, NPR (Aug. 30, 2017), https://www.npr.org/sections/thetwo-way/2017/08/30/547296613/in-houston-authorities-are-toughening-penalties-as-warning-to-would-be-looters.
[96] *See supra* note 69.

opportunity and all kinds of justice…we're not a city that's going to tolerate people victimizing people that are at the lowest point in their life."[97] Thus, there was a concerted effort by public officials and law enforcement to thwart potential criminal acts surrounding Hurricane Harney and the affected areas.

Discussion

Individuals Charged

After Hurricane Harvey hit, looting-related offenses were not seen in any significant numbers for most rural counties along the Gulf Coast.[98] The Brazoria County District Attorney's Office reported that two cases were referred to them by local law enforcement; Matagorda County reported two cases; Montgomery County reported one case; and Liberty County reported one case that was filed without alleging the looting enhancement but with the option to refile an enhanced case if the defendant did not plead guilty to the lesser-included offense.[99]

In Harris County, however, the District Attorney's Office reported that 74 defendants were charged with looting-related offenses allegedly committed during the disaster.[100] The breakdown of offenses charged is as follows: 49 burglary charges; 10 theft charges; 2 robbery charges; and 16 other related or co-occurring charges.[101] While a large percentage of these cases are still pending, many cases that have been resolved resulted in prison or jail time for the offenders. 13 felony defendants have been sentenced to prison for a combined total of 54.5 years; 4 felony defendants were sentenced to state jail for a combined total of 37 months; and 8 defendants were sentenced to time in county jail.[102] The Texas District and County Attorneys Association (TDCAA) testified at the committee's September 10, 2018 hearing that the structural damage of government buildings resulting from Hurricane Harvey has put stress on the criminal justice system, which has made processing such cases more difficult.[103] Regardless, the prosecutors are working through each case with due diligence.

Although the media may have sensationalized looting crimes during the disaster, the totality of criminal acts referred by law enforcement was not significantly high for a catastrophic event like Hurricane Harvey. Prosecutors assert that looting may have seemed more prevalent during the disaster than it actually was. Public perception of looting may have been affected by social media coverage of a few isolated incidents.[104] For example, a cellphone video of two men walking out of an evacuated electronics store with televisions circulated on Facebook, garnered 1.1 million views on that platform, and then was played repeatedly on the news.[105] Experts who study storms and their aftermath state that the fear of looting typically "outstrips the reality."[106] Additionally, the severe impact of the storm on the public safety and on the court system caused difficulties for law enforcement and prosecutors

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[97] *See supra* note 70.
[98] *Looting Charge: Hearing Before the S. Comm. on State Affairs*, 2018 Leg., 85th Interim (Tex. 2018) (written testimony by Shannon Edmonds, Dir. of Gov't Relations, TDCAA).
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] Janell Ross, *Tales of Looting, Crime Often Exaggerated After Disasters Like Harvey, Experts Say*, CHICAGO TRIB. (Sept. 1, 2017), http://www.chicagotribune.com/news/nationworld/ct-harvey-looting-20170901-story.html.
[106] *Id.*

when attempting to identify and apprehend suspects, gather and preserve evidence, find and obtain the cooperation of victims and witnesses, and process cases.[107] Even though law enforcement's job was made exponentially more difficult due to the storm, the Department of Public Safety (DPS) nonetheless took extraordinary measures to ensure the community was secure. One of DPS's primary missions during Hurricane Harvey was to prevent looting and protect personal property.[108] The Highway Patrol Division more than doubled its man power present in the area overnight.[109] In areas in which DPS was unable to patrol on foot, troopers patrolled by using boats.[110] DPS reported that during the entirety of the hurricane event, only seven individuals were arrested for looting-related offenses, even with troopers aggressively monitoring the scene.[111] Although not specific to looting crimes, 22 other arrest incidents did occur for other offenses that do not fall under the scope of Penal Code § 12.50.[112]

Another reason for the relatively low number of charged offenses is that some victims may have chosen not to report looting-related crimes because the economic losses they incurred from the looting were relatively small in the scale of other, greater losses suffered as a result of the storm.[113] Overall, with the magnitude of the tragedy in mind, the vast majority of Texas citizens obeyed the rule of law. Looting-related offenses were isolated events committed by a small number of bad actors.

Statutory Enhancement Language

With respect to the functionality of the looting enhancement law itself, TDCAA noted that the "necessity defense" language found in subsection (d) of § 12.50 is "non-standard" and superfluous.[114] The wording of subsection (d) would indicate that an individual charged with an enhanced version of a theft offense would have an affirmative defense to the enhancement if they committed the crime out of necessity.[115] However, if the defense of necessity applies in the case, the District Attorney's Office would be unable to prosecute the underlying theft offense.[116] Therefore, the enhancement defense is unnecessary and potentially confusing.[117]

Furthermore, the enhancement penalties only apply to a very specific subset of offenses: theft, burglary, robbery, and assault. While law enforcement and prosecutors did not see a single instance of looting-related assault during the hurricane, there were instances of other potentially looting-related property crimes that did not fall under Section 12.50. For example, law enforcement saw offenses such as arson, burglary of a vehicle, and criminal trespass, for which prosecutors were unable to charge an enhancement.[118] After gaining more first-hand knowledge from the most recent disaster,

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[107] *Looting Charge: Hearing Before the S. Comm. on State Affairs*, 2018 Leg., 85th Interim (Tex. 2018) (written testimony by Shannon Edmonds, Dir. of Gov't Relations, TDCAA).
[108] *Looting Charge: Hearing Before the S. Comm. on State Affairs*, 2018 Leg., 85th Interim (Tex. 2018) (oral testimony by Hank Sibley, Asst. Chief, Tex. Highway Patrol, Tex. Dept. of Pub. Safety).
[109] *Id.*
[110] Josh Saul, *Hurricane Harvey Makes Police Trade Beats for Boats as They Rescue Flood Victims and Cattle*, NEWSWEEK (Aug. 28, 2017), https://www.newsweek.com/hurricane-harvey-local-police-sheriff-deputies-flood-beats-boats-656065.
[111] *See supra* note 83.
[112] *Id.*
[113] *Looting Charge: Hearing Before the S. Comm. on State Affairs*, 2018 Leg., 85th Interim (Tex. 2018) (written testimony by Shannon Edmonds, Dir. of Gov't Relations, TDCAA).
[114] *Id.*
[115] TEX. PENAL CODE § 12.50.
[116] *Looting Charge: Hearing Before the S. Comm. on State Affairs*, 2018 Leg., 85th Interim (Tex. 2018) (written testimony by Shannon Edmonds, Dir. of Gov't Relations, TDCAA).
[117] *Id.*
[118] *Id.*

TDCAA asserts that statutory clarification may be justified.

Recommendations

In the wake of a natural disaster such as Hurricane Harvey, it is important to examine whether law enforcement and prosecutors had the tools necessary to deter potential looters and to punish those who did choose to take advantage of the disaster. A review of the looting enhancement statute, and of how that statute works in practice, clearly demonstrates that the enhancements are a useful tool to prosecutors and are being used with the proper discretion. However, as the state experiences more disasters and learns from these events, amending the statute may prove to be prudent.

First, the legislature may consider cleaning up the language of Section 12.50 by repealing the unnecessary and potentially confusing subsection (d). This subsection is superfluous, as a defendant would not need an affirmative defense to the enhancement penalty for a theft offense, since the underlying offense could not be prosecuted if such a necessity defense applied to the case. Second, the legislature may consider modifying the subset of offenses to which the enhancement penalties apply. It is possible that the scope of offenses eligible for enhancement penalties could be broadened to include such crimes as arson, burglary of a vehicle, and criminal trespassing. These statutory revisions may further deter looting-related crimes in the future and also ensure prosecutors have the tools necessary to effectively prosecute potential offenders.

Charge No. 5

Second Amendment: *Review local ordinances imposed on sellers and venues that affect a person's rights under the Second Amendment of the United States Constitution. Examine state and local regulations and restrictions regarding the carrying of weapons during a natural disaster. Make recommendations on whether any legislation is needed to address the regulatory barriers to the full exercise of the Second Amendment rights of citizens.*

The committee took no action relating to this charge.

Charge No. 6

Pensions: *Examine and assess public pension systems in Texas. Specifically, review and assess (1) the different types of retirement plans; (2) the actuarial assumptions used by retirement systems to value their liabilities and the consequences of amending those assumptions; (3) retirement systems' investment practices and performance; and (4) the adequacy of financial disclosures including asset returns and fees. Make recommendations to ensure public pension system retirees' benefits are preserved and protected.*

Background

A public pension, or retirement, system is an entity established by a state or local government to administer retirement benefits. Pension systems typically are created by statute or legal code and governed by a board of trustees. This board is ultimately responsible for overseeing the collection of contributions and the payment of benefits. Additionally, most boards are responsible for providing oversight of the investment of assets. Public pension systems can administer one or more pension plans.

Public pension funds hold and manage large sums of money—more than $10 trillion for the United States' largest 1,000 retirement plans.[119] These assets are held in trust for millions of retired public employees and their surviving family members, and for millions more working employees in state and local government. In 2016, there were 1.4 million police officers, firefighters and other first responders employed by state and local governments across the United States.[120] This is just a small fraction of the public employees working around the country.

In Texas, the Pension Review Board (PRB) oversees all Texas public retirement systems, both state and local, in regard to their actuarial soundness and compliance with state law. The PRB's mission is to provide the State of Texas with the necessary information and recommendations to ensure that Texas' public retirement systems are financially sound, benefits are equitable, the systems are properly managed, and tax expenditures for employee benefits are kept to a minimum while still providing for those employees. The PRB is also charged with expanding the knowledge and education of administrators, trustees, and members of Texas public pension funds.[121] The PRB's responsibilities include:

- Conducting a continuing review of all public retirement systems within the state, compiling and comparing information about benefit structures, financing, and administration of systems;
- Conducting intensive studies of existing or potential problems that weaken the actuarial soundness of public retirement systems;
- Insuring the equitable distribution of promised benefits to members of public retirement systems while maximizing the efficient use of tax dollars;
- Providing information and technical assistance to public retirement systems, their members,

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[119] Rob Kozlowski, *Largest U.S. Retirement Funds Set Record at $10.3 Trillion in Assets*, PENSIONS & INVESTMENTS (Feb. 5, 2018), http://www.pionline.com/article/20180205/PRINT/180209922/largest-us-retirement-funds-set-record-at-103-trillion-in-assets.

[120] *Pensions Charge: Hearing Before the S. Comm. on State Affairs*, 2018 Leg., 85th Interim (Tex. 2018) (written testimony by Nat'l Inst. on Ret. Sec.).

[121] *Texas Pension Review Board*, TEX. PENSION REVIEW BD., http://www.prb.state.tx.us/txpen/ (last visited Aug. 8, 2018).

the political entities which sponsor them, and the public;
- Recommending policies, practices, and legislation to public retirement systems and their sponsoring governments;
- Examining all legislation for potential effect on Texas' public retirement systems, overseeing the actuarial analysis process, and providing actuarial review when required by law;
- Administering the registration and reporting requirements under Chapter 802, Government Code; and
- Reporting Board activities to the Governor and Legislature in November of each even-numbered year.[122]

The PRB was established in 1979 as the state's oversight body for Texas public retirement systems at the state and local level. The PRB's service population consists of the members, trustees, and administrators of 340 public retirement plans; state and local government officials; and the general public.[123] The PRB monitors the financial and actuarial soundness of 99 actuarially funded defined benefit public retirement systems in Texas (including 2 hybrid plans), 160 defined contribution plans, and 81 pay-as-you-go volunteer firefighter plans.[124] As of December 2015, these retirement systems had approximately $241 billion in total net assets and 2.4 million members.[125] Through its oversight authority, the PRB plays a vital role ensuring public pension system retirees' benefits are preserved and protected.

Discussion

Different Types of Retirement Plans

Retirement plan design can range from an employer maintaining sole responsibility for providing a guaranteed lifetime benefit to employees bearing the full responsibility to finance their own retirement savings. In plans for state and local government workers, retirement plan design falls somewhere between those two extremes. There are three major types of retirement plans in the public sector: defined benefit, defined contribution, and hybrid plans.

A defined benefit (DB) plan promises a specified monthly benefit at retirement, usually based on the employee's length of service and salary. Most state and local governments require both employers and employees to contribute to their DB pensions while they are working. Typically, these plans are funded through a combination of employer contributions, employee contributions, and earnings from investments. Public pension assets are held in a trust and invested in diversified portfolios to prefund the cost of pension benefits. These pooled assets are professionally managed and provide economies of scale that lower fees and increase returns. Assets are then paid out in monthly installments during an employee's retired years, not as a lump sum. Typically, survivor and disability benefits are part of the financing and design of the DB pension plan. Retirees also may be eligible for cost-of-living adjustments (COLA), which may be capped or dependent on the pension plan investment performance.

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[122] *General Duties of the Board*, TEX. PENSION REVIEW BD , http://www.prb.state.tx.us/about/board/general-duties-of-the-board/ (last visited Aug. 8, 2018).
[123] *Pensions Charge: Hearing Before the S. Comm. on State Affairs*, 2018 Leg., 85th Interim (Tex. 2018) (written testimony by Tex. Pension Review Bd.).
[124] *Id.*
[125] TEX. PENSION REVIEW BD., GUIDE TO PUBLIC RETIREMENT SYSTEMS IN TEXAS (2017) [hereinafter PRB Guide], *available at* http://www.prb.state.tx.us/txpen/wp-content/uploads/2017/02/2017-Primer-Final.pdf.

DB plans are the most prevalent plan design in the public sector. The typical DB plan places some level of responsibility and risk on both the employer and employee. This use of shared financing and shared risk as part of plan design has grown in recent years as states have modified required employer and employee contributions, restructured benefits, or both. Most state and local governments offer DB pension plans to their employees, in part because public sector workers generally have accepted more modest wages in exchange for more retirement security. Retirement income also contributes to local and state economies as retirees spend their pension checks on goods and services where they live. DB plans in both the public and private sectors provide a reliable income for millions of Americans.

A defined contribution (DC) plan is a retirement savings vehicle that accumulates savings based on contributions to an employee's individual retirement account. A DC plan does not promise a specific retirement benefit. In this plan design, the employee, the employer, or both contribute to the plan, often at a certain percentage of the employee's salary. The employee will ultimately receive the balance in his or her account, which is based on contributions and any investment earnings. DC plans typically do not pool investments and employees are instead given a range of investment options they manage individually. While 401(k)s are most prevalent in the private sector, they are not common in the public sector, where 401(a), 403(b), and 457 DC plans are typically used instead. Although nearly all public employees have access to a DC plan as a supplemental savings plan, part of a hybrid plan, or as an alternative to a DB plan, only a handful of states provide a DC plan as their employees' only retirement plan option. In a DC plan, employees assume all of the investment and longevity risk. Employer obligations are fulfilled annually as contributions are made. Employers have some uncertainty about orderly retirements, particularly if investment returns drop and older employees decide to delay their retirement.

Hybrid pension plans combine elements of both DB and DC plans. The two most prevalent types of hybrid plans sponsored by state and local governments are: (1) a combination of DB and DC plans and (2) a cash balance plan. Combination plans typically include a modest DB element in combination with a DC plan. Cash balance plans marry elements of traditional pensions with individual accounts into a single plan. Employers generally guarantee an annual rate of return on a hypothetical account to which the employer, employee, or both contribute.

Debate over the merits and costs of various retirement plan structures has intensified recently as state and local pension funds address funding deficits and consider potential plan modifications. This is in part due to the economic downturn of 2008-2009, which left governmental plan sponsors with lower tax revenues to fund government expenditures, including pension costs. A significant number of plan sponsors have contributed less than the Actuarially Required Contribution (ARC) rate during this time, which, in addition to investment losses sustained by their pension funds, has increased Unfunded Actuarial Accrued Liabilities (UAAL) of plans.[126] Other factors impacting the debate include the impending retirements of the baby boomer generation and the rising costs of retiree health care.

Employees, employers, and taxpayers have a stake in state and local government pension plans.

[126] *A Review of Defined Benefit, Defined Contribution, and Alternative Retirement Plans*, TEX. PENSION REVIEW BD., (2012), http://www.prb.state.tx.us/files/education/research/finaldbdcwhitepaper.pdf. [hereinafter PRB Plan Review]

Pensions are important to employers because they help to attract and retain well-qualified individuals to work in government. This is important because of the investment that employers make in the training and experience of their workers. Pensions allow employers to manage the progression of their workers throughout their career to ensure that public services are delivered effectively and efficiently, even as one generation retires and new employees are hired. All stakeholders have a vested interest in retirees who are financially independent and do not require costly social services to meet their basic needs. For retirees, pensions are essential to help provide an adequate standard of living throughout their retirement years. In addition, employers, employees, and taxpayers alike place a high priority on reasonable, predictable pension costs.

From 2009 to 2015, every state made meaningful changes to one or more of its pension plans.[127] Although the market crash and the recession affected all plans, plan changes varied because of differing designs, budgets, and legal frameworks across the country. Each state or local government made modifications that were tailored to its unique circumstances. Similar to other states, Texas has a variety of different types of pension plans that vary greatly in size and consist of different types of obligations, benefits, and plan design.

Although comprehensive modifications have been made across the country to public pension plans, only five states (Michigan, Rhode Island, Tennessee, Utah, and Virginia) created combination hybrid plans.[128] The most common change to pension plans during this time was an increase in employee contributions. Increases in contributions often have applied to both current and new employees. Other plan changes, such as increasing the retirement age, typically have applied to new employees. Some plans reduced or eliminated automatic COLAs or reduced the amount of income replaced in retirement for each year worked. Retirement plan changes that are successful in preserving a sustainable pension to pay benefits for the long-term follow a deliberative and informed process, engage employees and other stakeholders, keep the government competitive in recruiting and retaining employees, and rely on high quality data. Because each pension plan is unique and complex in its own way, there are many challenges, legally and financially, to consider before making sweeping reforms. The Texas Legislature learned this first-hand during the 85th Legislative Session passing Senate Bill 2190 and House Bill 3158, both local pension plan reforms. These pieces of legislation were certainly complex and involved significant input from pension and legal experts, employees and employers, and other interested parties with the intent to preserve benefits as much as fiscally possible and make these local pension plans sustainable well into the future.

Actuarial Assumptions

Funding a pension benefit requires the use of projections, known as actuarial assumptions, about future events. Actuarial assumptions fall into one of two broad categories: demographic and economic. Demographic assumptions are those pertaining to a pension plan's membership, such as changes in the number of working and retired plan participants, when participants will retire, and how long they will live after they retire. Economic assumptions pertain to such factors as the rate of wage growth and the future expected investment return on the fund's assets.

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[127] *Understanding Public Pensions: A Guide for Elected Officials*, AARP, (April 2017), https://www.nctreasurer.com/ret/Documents/UnderstandingPublicPensions.pdf.
[128] *Id.*

Because investment earnings account for a majority of revenue for a typical public pension fund, the accuracy of the return assumption has a major effect on a plan's finances and actuarial funding level. An investment return assumption that is set too low will overstate liabilities and costs, causing current taxpayers to be overcharged and future taxpayers to be undercharged. A rate set too high will understate liabilities, undercharging current taxpayers, at the expense of future taxpayers. An assumption that is significantly wrong in either direction will cause a misallocation of resources and unfairly distribute costs among generations of taxpayers. This is why actuarial assumptions for public pension funds have recently drawn so much attention among the media, state and local policymakers, pension experts, and taxpayers.

Assumptions should occasionally change to reflect new information, mortality improvement, changing patterns of retirements, terminations, and changing knowledge. Most public retirement systems review their actuarial assumptions regularly, pursuant to state or local statute or system policy. Texas law requires plans with assets of at least $100 million to review their actuarial assumptions every 5 years.[129] For plans with assets less than $100 million, PRB Funding Guideline #6 states that all plans should review actuarial assumptions at least once every five years.[130] Although the statewide plans are exempt from this requirement, they have their own experience study requirements in their statutes.[131]

The pension funds are responsible for setting the return assumption and typically work with one or more professional actuaries, who follow guidelines set forth by the Actuarial Standards Board in Actuarial Standards of Practice No. 27 (ASOP 27).[132] ASOP 27 prescribes the factors actuaries should consider in setting economic actuarial assumptions, and recommends that actuaries consider the context of the measurement they are making.[133] Per ASOP 27, an economic assumption is reasonable if: (1) it is appropriate for the purpose of the measurement; (2) it reflects the actuary's professional judgement; (3) it takes into account historical and current economic data that is relevant as of the measurement date; (4) it reflects the actuary's estimate of future experience; and (5) it has no significant bias.[134]

ASOP 27 also advises that actuarial assumptions be reasonable, and requires that actuaries consider relevant data, such as current and projected interest rates and rates of inflation; historic and projected returns for individual asset classes; and historic returns of the fund itself. For plans that remain open to new members, actuaries focus chiefly on a long investment horizon, i.e., 20 to 30 years, which is the length of a typical public pension plan's funding period.[135] One key purpose for relying on a long timeframe is to promote the key policy objectives of cost stability and predictability, and intergenerational equity among taxpayers. The investment return assumption used by public pension plans typically contains two components: inflation and the real rate of return. The sum of these components is the nominal return rate, which is the rate that is most often used and cited. The system's inflation assumption typically is applied to other actuarial assumptions, such as the level of wage

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[129] TEX. GOV'T CODE § 802.1014.
[130] TEX. PENSION REVIEW BD., PENSION FUNDING GUIDELINES (2017), http://www.prb.state.tx.us/txpen/wp-content/uploads/2017/03/PRB-Pension-Funding-Guidelines.pdf (last visited Oct. 10, 2018).
[131] TEX. GOV'T CODE §§ 815.206 & 825.206.
[132] ACTUARIAL STANDARDS BD., SELECTION OF ECONOMIC ASSUMPTIONS FOR MEASURING PENSION OBLIGATIONS (2013), http://www.actuarialstandardsboard.org/wp-content/uploads/2014/02/asop027_172.pdf (last visited Oct. 10, 2018).
[133] *Id.*
[134] *Id.*
[135] *NASRA Issue Brief: Public Pension Plan Investment Return Assumptions*, NASRA (2018), https://www.nasra.org/files/Issue%20Briefs/NASRAInvReturnAssumptBrief.pdf (last visited Oct. 10, 2018).

growth and, where relevant, assumed rates of cost-of-living adjustments (COLA). The second component of the investment return assumption is the real rate of return, which is the return on investment after adjusting for inflation. The real rate of return is intended to reflect the return produced as a result of the risk taken by investing the assets.

In the wake of the 2008-09 decline in capital markets, global interest rates and inflation have remained low by historic standards. Now, these low interest rates, with low rates of projected global economic growth, have led to reductions in projected returns for most asset classes, which, in turn, have resulted in an unprecedented number of reductions in the investment return assumption used by public pension plans across the country. In fact, the average investment return assumption for Texas public retirement systems is currently 7.46%, while the national average is 7.36%.[136] If projected returns continue to decline, investment return assumptions are likely to also to continue their downward trend.[137]

One challenge of setting the investment return assumption that has emerged more recently is a divergence between expected returns over the near term, i.e., the next 5 to 10 years, and over the longer term, i.e., 20 to 30 years. A growing number of investment return projections are concluding that near-term returns will be materially lower than both historic norms as well as projected returns over longer timeframes. Because many near-term projections calculated recently are well below the long-term assumption most plans are using, some plans face the difficult choice of either maintaining a return assumption that is higher than near-term expectations, or lowering their return assumption to reflect near-term expectations. If actual investment returns in the near-term prove to be lower than historic norms, plans that maintain their long-term return assumption risk experiencing a steady increase in unfunded pension liabilities and corresponding costs. Alternatively, plans that reduce their assumption in the face of diminished near-term projections will experience an immediate increase unfunded liabilities and required costs. In Texas, the two biggest statewide public pension systems, the Employees Retirement System of Texas (ERS) and the Teachers Retirement System of Texas (TRS), have recently been challenged with this exact dilemma. Even revising the return assumption just slightly for these large systems has a dramatic impact on the state's budget, unfunded liabilities and costs, and taxpayers.

The investment return assumption is the single most consequential of all actuarial assumptions in terms of its effect on a pension plan's finances. The sustained period of low interest rates since 2009 has caused many public pension plans to re-evaluate their long-term expected investment returns, leading to an unprecedented number of reductions in plan investment return assumptions around the country. Absent other changes, a lower investment return assumption increases both the plan's unfunded liabilities and cost. Furthermore, lowering the return assumption results in higher contribution requirements. With Texas' constitutional limits on public pension contributions, this also presents challenges for the Texas legislature. Because of the potential impact, the process for evaluating a pension plan's investment return assumption should include abundant input and feedback from professional experts and actuaries, and should reflect consideration of the factors prescribed in actuarial standards of practice.

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[136] *See supra* note 67.
[137] *See supra* note 79.

Investment Practices and Performance

Since the financial crisis, public pension plans, like other large institutional investors, have moved a significant portion of their portfolios into investments outside of traditional equities, bonds, and cash. This has been true of Texas plans too. Texas statewide plans' alternatives allocation grew from 2% in 2005 to 31% in 2015.[138] Texas municipal plans' alternatives allocation grew from 9% in 2005 to 29% in 2015.[139] These alternative investments include a diverse assortment of assets including private equity, hedge funds, real estate, and commodities. This shift reflects a search for greater yields than expected from traditional stocks and bonds, an effort to hedge other investment risks, and a desire to diversify the portfolio.

In general, alternatives tend to be riskier and less liquid than traditional equity and fixed income, so investors have the opportunity to earn both a risk premium and a liquidity premium.[140] Proponents of alternative investments argue that the returns on many alternatives are uncorrelated with those in the stock market, so they can add diversification to a portfolio and help mitigate volatility. On the other hand, investments in alternatives involve a number of challenges. First, these investments are often complex, and many investors may not fully understand the exact nature of the products and their attendant risks. Second, in many instances, it is difficult to make annual assessments of the value of the investment. Third, complicated investments involve high fees. Finally, the fact that these assets are generally illiquid can pose risks for investors that need liquidity.[141]

Overall, 2017 produced very strong returns for public pension systems in terms of equity performance for statewide and some large municipal systems.[142] For example, in 2017, the statewide pension systems earned an average investment return of 10.62% while the municipal systems earned 9.04%.[143] Although the long-term return (30 years or longest term available between 11-30 years) for the statewide systems comes in at 8.04%, the 10-year investment return drops significantly to average 5.56%[144]

As of June 14, 2018, PRB's Actuarial Valuation Report states that the average funded ratio of all Texas public pension systems is 79.1%.[145] Furthermore, the majority of Texas systems (58 out of 93) have amortization periods within PRB Guidelines of no more than 30 years, and 37 out of 93 are at no more than 25 years (PRB's preferred target range is 10-25 years).[146] Although the total unfunded actuarial accrued liability is now over $69.4 billion, it is noteworthy that about half of that is comprised of TRS' unfunded liability ($35.5 billion).[147] Although the funded ratios are slightly up from the previous year, Texas public pension systems must continue to be vigilant to cut down on unfunded liabilities to ensure retirees' benefits are preserved and protected for decades to come.

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[138] *Pensions Charge: Hearing Before the S. Comm. on State Affairs*, 2018 Leg., 85th Interim (Tex. 2018) (oral testimony by Tex. Pension Review Bd.).
[139] *Id.*
[140] *A First Look at Alternative Investments and Public Relations*, CTR. FOR RET. RESEARCH AT BOSTON COLL. (2017), http://crr.bc.edu/wp-content/uploads/2017/06/slp_55.pdf.
[141] *Id.*
[142] *See supra* note 82.
[143] *See supra* note 67.
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] *Id.*

Adequacy of Financial Disclosures

For many public pension systems, current disclosure policies make it difficult for policymakers, stakeholders, and the public to gauge the actual performance of these funds. Opaqueness of fee information, particularly with respect to alternative investments not traded publicly, continues to be an issue for pension funds across the country. Because of this, some states, including Texas, have passed laws to increase fee transparency and disclosures. To develop a more complete understanding of both the results and the costs of different investment strategies and to improve transparency through greater disclosure, state legislatures and pension funds should consider:

- Adopting comprehensive fee-reporting standards;
- Making investment policy statements transparent and accessible;
- Disclosing bottom-line performance, both net and gross of fees;
- Expanding reporting to include longer-term performance results; and
- Reporting results by asset class, net and gross of fees.

The call for standardized reporting and transparency of private equity fees in the United States is gaining momentum. The Institutional Limited Partners Association's Fee Transparency Initiative, a widely supported industry effort to establish comprehensive standards for fee and expense reporting among institutional investors and fund managers, is advocating for total fee reporting by private equity managers and their investors.[148] Further, in a recent letter to the Securities and Exchange Commission, thirteen state and municipal treasurers and comptrollers made an appeal for industrywide standards on private equity fee disclosure.[149]

The Government Finance Officers Association (GFOA) recommends that each pension plan develop a concrete statement of investment goals that describes its investment and risk tolerance.[150] Making these investment policies transparent and readily accessible provides stakeholders with critical information on the strategies that pension systems follow for the investment of public funds. Clear information that accounts for the costs of managing assets is needed to fully understand investment performance. Reporting performance both gross and net of fees gives stakeholders information on both the cost and bottom-line results of pension funds' investment strategies.

The GFOA recommendations also call for funds to provide performance results by asset class over time, as well as full disclosure of long-term investment performance by investment type or asset class. State retirement systems in Georgia, Kentucky, Louisiana, Missouri, and New York already release comprehensive 20-year data on performance returns by asset class.[151] Currently, only Georgia and Missouri make that information available net of fees. South Dakota is the only state to disclose 20-year performance net and gross of fees but does not break this reporting down by asset class.[152] While the performance of individual asset classes may vary over the short term, long-term performance data must be available to assess the overall success of the investment strategy when dealing with public funds. Further, disclosure of performance both gross and net of fees by asset class would provide

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[148] *Making State Pension Investments More Transparent*, PEW (Feb. 18, 2016), http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/02/making-state-pension-investments-more-transparent.
[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] *Id.*

stakeholders and the public with bottom-line results and a clearer picture of the cost of implementing the investment strategy identified in fund policy.

Allocation of assets and bottom-line performance ultimately determine pension plans' fiscal health and the ability to pay for the promised retirement benefits. In fact, pension experts estimate that investment returns account for 60 percent of pension benefits.[153] The fees and cost of managing these assets can significantly affect the long-term costs of providing retirement benefits to public workers. There is no one-size-fits-all approach to investing pension assets. However, because many alternative investments involve greater risk and complexity, boosting transparency is essential.

Recommendations

Every state and local pension plan has its own history, legal framework, and characteristics. Due to this complexity, solutions to pension funding and other challenges must be tailored to the individual needs and circumstances of participating employers and workers. Regardless, each public pension system, in coordination with local and state government, should have a clear pension funding policy that lays out a plan to fully fund pension benefits within a reasonable time period. A sound pension funding policy offers guidance in making annual budget decisions, documents prudent financial management practices, and provides transparency as to how and when pensions will be funded. Policymakers, stakeholders, and the public need full disclosure on investment performance and fees to ensure that risks, returns, and costs are balanced in ways that follow best practices and meet funds' policy needs.

In examining pension plans that are well funded, certain strategies stand out. Without exception, these pension plans have been able to count on the employer contributions. These governments routinely make their full contribution whether the economy is prosperous or not. Additionally, if the pension system needs to make changes to their pension plan design, it is done based on reliable data; all stakeholders are engaged as changes are considered; and pension plan objectives remain a priority. Finally, well funded pension plans are rigorous in examining their assumptions to ensure they accurately reflect the plan's experience and that any needed adjustments can be made in a timely fashion.

Improving a pension plan's funded status can be achieved with discipline and commitment. As more workers retire and a younger generation moves into the government workforce, attracting and retaining well qualified individuals is more important than ever. Therefore, it is critical to balance stakeholder objectives to produce a sustainable retirement system that is both competitive and cost-effective. The Texas Legislature must keep these strategies at the forefront to ensure public pension system retirees' benefits are preserved and protected for generations to come.

[153] *Id.*

Charge No. 7

Attorney General Jurisdiction: *Examine the Attorney General's jurisdiction on issues of alleged violations of state laws regarding abortion and multi-jurisdictional human trafficking cases. Make recommendations to ensure uniform enforcement across the state.*

Background

The Office of the Attorney General (OAG) represents the state and its agencies in all litigation, provides legal advice and counsel to state officials, and defends the laws and the Constitution of the State of Texas.[154] To fulfill these responsibilities, the OAG serves as legal counsel to all boards and agencies of state government; issues legal opinions when requested by the Governor, heads of state agencies, and other officials and agencies as provided by Texas statutes; sits as an ex-officio member of state committees and commissions; and defends challenges to state laws and suits against both state agencies and individual employees of the state.[155]

As lawyers for the State of Texas, the OAG handles a wide variety of legal matters. Texas statutes contain nearly 2,000 references to the Attorney General.[156] In addition to its constitutionally prescribed duties, the OAG files civil suits upon referral by other state agencies and assists in criminal suits upon request by law enforcement agencies and district attorneys throughout the state. In some circumstances, the Attorney General has original jurisdiction to prosecute civil violations of the law without referral from another agency.[157]

However, under Texas law, the county or district attorney has primary jurisdiction to prosecute most criminal offenses. The OAG assists local prosecutors at their request. The law also authorizes this agency to proffer assistance to local prosecutors. Therefore, most OAG prosecutions are undertaken on referrals. Chapter 1, Section 1.09 of the Penal Code provides that, "with the consent of the appropriate local county or district attorney, the attorney general has concurrent jurisdiction with that consenting local prosecutor to prosecute under this code any offense an element of which occurs on state property or any offense that involves the use, unlawful appropriation, or misapplication of state property, including state funds."

There are also many laws that give the Attorney General, district attorneys, and county attorneys concurrent enforcement powers. For example, the Attorney General and district attorneys possess concurrent enforcement power over: (1) laws regulating mental health facilities; (2) laws on labeling plastic containers; and (3) laws governing the construction of outdoor shooting ranges. These are just a few of many examples specified in state statute.

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[154] *Duties & Responsibilities of the Attorney General,* TEX. ATT'Y GEN., https://www.texasattorneygeneral.gov/agency/duties.pdf (last visited Aug. 8, 2018).
[155] *Id.*
[156] *Id.*
[157] *Id.*

Discussion

Abortion

The Attorney General, as the chief legal officer of the State, has broad discretionary power in conducting his or her legal duties and responsibilities.[158] In the rare instances when the OAG does not have power to enforce state laws, the Legislature has responded by providing the Attorney General the necessary power by law. For example, in 1955, the Texas Supreme Court held that the Attorney General did not have power to sue to remove a county commissioner for nepotism law violations because under the Constitution, only the district attorney had that power.[159] The Legislature eventually responded by providing the Attorney General quo warranto power to remove a commissioner for violating the anti-nepotism statute.[160]

Many laws give the Attorney General, district attorneys, and county attorneys concurrent enforcement powers. However, these types of concurrent enforcement powers, where both the Attorney General, district attorneys, and county attorneys can act to enforce a state law has not been utilized with the same force in regards to the state's abortion laws.[161] Just recently, during the First Called Special Session of the 85th Legislature, the Legislature enacted House Bill 13, which gave the Attorney General power to seek civil penalties for violations of the mandatory abortion reporting requirements.[162] Prior to House Bill 13, the Attorney General lacked the authority to enforce the reporting requirements. Additionally, during the 85th Legislature, Senate Bill 8 made partial birth abortions a felony that local prosecutors may prosecute, but did not expressly authorize the Attorney General to enforce the law.[163] Moreover, with respect to the donation of human fetal tissue, the OAG, at the request of the Texas Health and Human Services Commission (HHSC) or local law enforcement, may assist in an investigation of possible violation of chapter 173 of the Health and Safety Code.[164] Similarly, the OAG has concurrent jurisdiction to enforce the criminal penalty associated with Senate Bill 8 (partial birth & dismemberment), but only with the consent of the local county or district attorney.[165]

According to the OAG, the Attorney General's inability to independently investigate and enforce these laws leads to two problems. First, with smaller offices and budgets, many local prosecutors do not have the capacity and resources to pursue enforcement of these laws.[166] Second, some local prosecutors have little interest in enforcing these laws.[167] The OAG asserts that because of the politically charged nature of this issue, not every local prosecutor is enforcing these laws consistently.[168] Potentially, as a result, these problems lead to inconsistent enforcement throughout the state, and may even create "safe havens" for those who wish to disobey certain politically charged laws.[169]

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[158] *Terrazas v. Ramirez*, 829 S.W.2d 712, 721 22 (Tex. 1991) (citing TEX. CONST. art. IV, § 22).
[159] *Garcia v. Laughlin*, 285 S.W.2d 191, 195 (Tex. 1955).
[160] TEX. GOV'T CODE § 573.082.
[161] *Attorney General Jurisdiction Charge: Hearing Before the S. Comm. on State Affairs*, 2018 Leg., 85th Interim (Tex. 2018) (testimony of David Hacker, Special Counsel for Tex. Att'y Gen. Civil Litigation).
[162] Tex. H.B. 13, 85th Leg., R.S. (2017) (codified as Tex. Gov't Code § 531.0999).
[163] Tex. S.B. 8, 85th Leg., C.S. (2017) (codified as an amendment to Tex. Ins. Code, Title 8).
[164] TEX. HEALTH & SAFETY CODE § 173.003.
[165] TEX. HEALTH & SAFETY CODE § 173.007.
[166] *See supra* note 105.
[167] *Id.*
[168] *Id.*
[169] *Id.*

The state has seen similar issues arise in the context of cooperation with federal immigration authorities. Some Texas counties and municipalities declared themselves sanctuaries for illegal immigration, leading to inconsistent cooperation with federal immigration authorities.[170] Because of this, the 85th Legislature chose to address this problem by enacting Senate Bill 4 to establish a uniform law enforcement policy throughout the state.[171] Thus, giving the Attorney General concurrent enforcement authority over the state's abortion laws is not an uncommon practice when laws are not uniformly enforced.

However, there are some that assert that granting concurrent jurisdiction to enforce abortion laws is unnecessary. These individuals believe that the concept of providing the OAG with concurrent jurisdiction regarding regulations on abortions is part of a national strategy to restrict access to abortion.[172] Opponents assert that local prosecutors have the tools necessary to enforce these laws and can ask for the OAG's assistance if necessary, but providing concurrent jurisdiction only sets up a turf war.[173] Furthermore, challengers claim that the only counties in the state with abortion facilities where these laws may become an issue are in the larger urban counties where local prosecutors have plenty of resources to prosecute violators.[174]

Recommendations

All laws must be equally and uniformly enforced across the state, regardless of the political nature of the issue. Without consistent enforcement from law enforcement and prosecutors, the Texas justice system fails to protect all Texans. If there is disagreement regarding public policy, change must be sought through the state's policy makers. To ensure uniform enforcement of alleged violations of the state's abortion laws, the legislature may deem it appropriate to provide the OAG with concurrent jurisdiction in these limited abortion-related cases.

Multi-jurisdictional Human Trafficking

Human trafficking is modern day slavery. Kevin Bales of *Free the Slaves* defines it as "a relationship in which one person is controlled by violence through violence, the threat of violence, or psychological coercion, has lost free will and free movement, is exploited economically, and paid nothing beyond subsistence."[175] Under Texas law, there are four major types of trafficking: (1) trafficking of adults for forced labor, for instance in agriculture, food service, factory work or sales; (2) trafficking of adults for sex, in strip clubs, brothels, massage parlors, street or internet prostitution; (3) trafficking of children under the age of 18 for forced labor; and (4) trafficking of children under the age of 18 for sex.[176] An individual can be trafficked into any industry or type of work. Legally, someone is trafficked if force, fraud, or coercion is applied to make the trafficked person work or if a child under the age of 18 is trafficked for sex by any means, regardless of whether the trafficker has to use force, fraud, or coercion.

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[170] *Id.*
[171] Tex. S.B. 4, 85th Leg., R.S. (2017) (codified as an amendment to Tex. Gov't Code, Subtitle F, Title 10).
[172] *Attorney General Jurisdiction Charge: Hearing Before the S. Comm. on State Affairs*, 2018 Leg., 85th Interim (Tex. 2018) (testimony of Blake Rocap, Legislative Counsel, NARAL Pro-Choice Texas).
[173] *Id.*
[174] *Id.*
[175] *Human Trafficking*, TEX. ATT'Y GEN., https://texasattorneygeneral.gov/human-trafficking (last visited Aug. 8, 2018).
[176] *Types of Human Trafficking*, TEX. ATT'Y GEN., https://texasattorneygeneral.gov/human-trafficking (last visited Aug. 8, 2018).

Sadly, Texas is at the heart of human trafficking in the United States. Houston has the highest number of trafficking victims in the nation, and Texas is the second highest in the nation for number of calls to the National Human Trafficking Resources Center.[177] Because of this, the Attorney General recently established a new unit within the OAG dedicated to combating human trafficking. The Human Trafficking and Transnational Organized Crime (HTTOC) section of the OAG is designed to fight back against the horrific crime of human trafficking through investigations, prosecutions, training, and raising awareness.[178]

This unit provides the state with a new weapon in the fight against human trafficking, transnational gangs, and organized crime syndicates that threaten the fundamental liberties of the people of Texas. HTTOC consists of investigators, lawyers, a forensic accountant, and a victims' advocate, dedicated to the rescue of victims and the investigation of criminal human trafficking across the state.[179] The HTTOC unit is also training thousands of law enforcement and prosecutorial officers across the state to become more knowledgeable about these cases. Currently, HTTOC gets their cases by working on referrals that come through the National Center for Missing and Exploited Children as well as direct referrals from district attorneys and law enforcement agencies.[180]

Because human trafficking is prevalent in Texas, all local and state resources must prioritize eradication of these heinous crimes. Thus, enabling the OAG concurrent jurisdiction on human trafficking cases may further the state's effort to combat these crimes. Concurrent jurisdiction is defined as the ability of either the local prosecutor or the OAG to bring a criminal suit.[181] Concurrent jurisdiction on human trafficking cases would grant the OAG the authority to initiate a criminal suit even if the local prosecutor chose not to do so. However, the local prosecutor could still choose to start a suit at any point, regardless of the action or inaction of the OAG. Although the HTTOC unit of the OAG does assist local prosecutors when requested, concurrent jurisdiction would ensure that the state's resources and expertise in this area are fully utilized in each human trafficking case. In these cases, local and state authorities must work side-by-side to guarantee that the victims are rescued and that the criminals are prosecuted efficiently and effectively. However, should the legislature deem concurrent jurisdiction in human trafficking cases prudent, it would be imperative that concurrent jurisdiction be limited to only human trafficking crimes and not extend to other unrelated crimes.

Although local law enforcement and prosecutors typically handle the investigation and prosecution of criminal crimes in their jurisdiction, human trafficking cases often present unique challenges that the OAG is equipped to handle more efficiently than most counties. Many of the larger Texas counties have dedicated units for human trafficking that are fully equipped to handle these cases; however, the overwhelming majority of counties do not have the resources or experience to efficiently handle the complexity of these cases.[182] Therefore, permitting the OAG concurrent jurisdiction would empower all counties the ability to utilize the state's resources to successfully combat human trafficking. Because the OAG has specific personnel in its HTTOC unit dedicated towards investigating,

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[177] *See supra* note 117.
[178] *AG Paxton Announces New Agency Human Trafficking Unit*, TEX. ATT'Y GEN. (Jan. 14, 2016), https://www.texasattorneygeneral.gov/news/releases/ag-paxton-announces-new-agency-human-trafficking-unit.
[179] *Id.*
[180] *Attorney General Jurisdiction Charge: Hearing Before the S. Comm. on State Affairs*, 2018 Leg., 85th Interim (Tex. 2018) (testimony of Adrienne McFarland, Deputy Attorney General for Criminal Justice).
[181] *Id.*
[182] *Id.*

prosecuting, and assisting victims of these crimes on a daily basis, complete access to these resources would greatly benefit each county across the state. OAG's HTTOC unit has the resources to hire expert witnesses and provide victims' with rehabilitation services that may not be available otherwise.[183] Although providing the OAG with concurrent jurisdiction may take away partial control of human trafficking cases from local jurisdictions, every effort and resource must be utilized to fight these crimes.

Furthermore, human trafficking frequently occurs across county lines, which can result in difficulties during all stages of these cases. Concurrent jurisdiction may alleviate certain complications in these multi-jurisdictional cases because the OAG could prosecute crimes in any county whereas a local prosecutor is restricted by jurisdictional boundaries. These cases become more complex for local law enforcement and prosecutors when it requires coordination among neighboring jurisdictions. Concurrent jurisdiction with the OAG may alleviate some of those challenges in a multi-county situation since the OAG is well-positioned to handle communication with law enforcement in different areas. Additionally, the OAG asserts that it would be beneficial for the state to be able to pick one county where the alleged victim was trafficked and then prosecute all offenses, regardless of where they occurred, in that one county.[184] This would certainly ease the anguish that victims must endure during prosecution by not having to testify multiple times in different jurisdictions.

Although concurrent jurisdiction in criminal cases is rare, Texas law does allow it in limited circumstances. For example, criminal violations in the Texas Election Code may be prosecuted by the local prosecutor or the OAG.[185] Current law authorizes the OAG to prosecute election law offenses under original jurisdiction. This concurrent jurisdiction has also been ruled by courts to be constitutional and that it does not violate the separation of powers doctrine.[186] Similar to election law cases, concurrent jurisdiction would help ensure uniform enforcement of human trafficking crimes across the state, regardless of each county's resources.

Recommendations

Traffickers have found ways to quietly and almost completely invade our home life, our school life, and the youth culture. In 2016, there were more than 7,600 cases of human trafficking reported nationwide, according to the National Human Trafficking Hotline. Texas accounted for 665 of the cases reported, trailing only California with the most reports of human trafficking.[187]

Federal law enforcement agencies are getting creative in their efforts to fight the epidemic of human trafficking. The Texas Attorney General has established the HTTOC unit as a new tool to combat human trafficking. However, more must be done. Permitting the OAG concurrent jurisdiction on human trafficking cases may further the state's effort to combat these crimes. Every effort and resource must be utilized to fight these crimes and ensure uniform enforcement across the state. It is imperative that current law and jurisdictional limitations do not inadvertently create a "safe heaven" for traffickers to abuse the criminal justice system to avoid detection or prosecution.

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[183] *Id.*
[184] *Id.*
[185] *Id.*
[186] *Id.*
[187] Tiffany Huertas, *Texas Human Trafficking Epidemic Among Worst in Nation*, KSAT (Jan. 30, 2018), https://www.ksat.com/news/texas/texas-human-trafficking-epidemic-among-worst-in-nation.

Charge No. 8

Court Fees: *Examine the structure of court fees and make recommendations to ensure statutory filing fees and court costs are appropriate and justified. Provide recommendations for proper agency oversight of fee collection.*

Background

The court fee and cost system that exists in Texas is complex and while many past efforts to simplify the system have resulted in some improvements, there are further improvements the legislature may consider. Court costs and fees were initially established by the First Legislature in 1836.[188] These costs and fees have thus been a reality of our government since the beginning. However, as time has passed, the number of costs and fees has increased as has the complexity of the structure. Court costs and fees may be imposed in either civil or criminal cases. Currently, there are 143 separate court costs that may be assessed in criminal cases and 223 separate costs that may be assessed in civil cases.[189] When determining which fees to assess, a court clerk's job can be very difficult, as they must determine the type of case at hand and then determine autonomously which fees are applicable.[190]

Each court cost and fee is authorized by statute.[191] For each cost, there are a number of factors to be considered such as: when the cost should be assessed, in what type of case the cost should be assessed, if there is a limitation on which courts may assess the cost, if the cost is mandatory or discretionary, what the revenue destination from the cost collection will be, and the stated statutory purpose of the cost.[192] The cost destination is always provided for in the cost's authorizing statute.[193] The 83rd Legislature enacted Senate Bill 1908 to establish a one-time review mechanism for the Office of Court Administration (OCA) to study the existing fees and costs and determine whether the fees and costs are necessary to accomplish their stated statutory purposes.[194] The report issued by OCA was the first to collect information on all distinct factors of each cost and fee.[195] When determining whether or not a fee was "necessary," OCA found that a fee or cost is necessary if it was enacted by the legislature for a purpose that is not now obsolete.[196] This 2014 report raised a number of concerns. Namely, some fees and costs currently have no stated statutory purpose.[197] Additionally, court fees and costs are often used to fund programs outside of and unrelated to the judiciary.[198] And finally, many court fees and costs are collected for a purpose but the revenue is then not dedicated or restricted to be used exclusively for said purpose.[199]

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[188] *Court Costs & Fees Charge: Hearing Before the S. Comm. on State Affairs*, 2018 Leg., 85th Interim (Tex. 2018) (oral testimony of David Slayton, Admin. Dir., Office of Ct. Admin.).
[189] *Id.*
[190] *Court Costs & Fees Charge: Hearing Before the S. Comm. on State Affairs*, 2018 Leg., 85th Interim (Tex. 2018) (oral testimony of Teresa Kiel, Guadalupe Cnty. Clerk, Cnty. & Dist. Clerks Assoc. of Tex.).
[191] *See supra* note 190.
[192] Tex. S.B. 1908, 83rd Leg., R.S. (2013) (codified as an amendment to Tex. Gov't Code, Subchapter C, Ch. 72).; *Study of the Necessity of Certain Court Costs and Fees in Texas*, OFFICE OF CT. ADMIN. (2014), http://www.txcourts.gov/media/495634/SB1908-Report-FINAL.pdf. [hereinafter OCA NECESSITY STUDY].
[193] *See supra* note 190.
[194] OCA NECESSITY STUDY at 1.
[195] *Id.* at 1-2.
[196] *Id.* at 2.
[197] *Id.*
[198] *Id.*
[199] *Id.*

There are a number of other ongoing issues with respect to court costs and fees. First, a number of criminal court costs have been found to be facially unconstitutional by appellate courts in Texas as the funds collected from the imposition of these costs were not being appropriately directed toward a legitimate criminal justice purpose.[200] All costs and fees should be reviewed to ensure the funds are being applied in a manner that complies with the existing case law and the set standard. Second, there exists a need to continuously review all costs and fees to ensure that they are appropriate and necessary. While OCA's above-mentioned one-time review of the existing costs and fees was immeasurably helpful and valuable, the review should be conducted on a routine basis. Third, there exists a possibility to consolidate certain costs and fees in a way that could expedite the process through which they are collected.[201] This could streamline the complex collection process. Additionally, clerks' jobs increases in complexity with the fee structure and they should receive sufficient education and training with regard to the collection of the fees and costs so that the correct amount is being assessed during each transaction.

Discussion

Necessity of Costs & Fees

As mentioned, OCA's 2014 Report demonstrates that some court costs and fees have no explicitly stated statutory purpose.[202] Additionally, there are some fees and costs that are not necessary to accomplish their stated purpose.[203] As part of the study's recommendations, OCA proposed a review of all court fees and costs that have an unclear statutory purpose.[204] Another recommendation was a review of the fees and costs that are used to fund programs outside of and unrelated to the judiciary.[205] Finally, OCA recommended reviewing the practice of depositing court fees and costs into the general fund to be appropriated at the discretion of the funding body, rather than restricting the use of or utilizing dedicated accounts for court fees and costs dedicated to a specified purpose.[206] These reviews should be done on a continuous basis as fees and costs may become unnecessary as time passes or their purpose or cost destination may become obsolete.

Potentially Unconstitutional Costs & Fees

In the past two years, six appellate court decisions have been handed down which found a number of Texas's court costs and fees to be unconstitutional.[207] A Houston Court of Appeals found a jury fee facially unconstitutional in violation of a separation-of-powers provision.[208] Another Houston Court of Appeals found a summoning fee, a mileage fee for summoning witnesses, and a prosecutor fee to

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[200] *Court Costs & Fees Charge: Hearing Before the S. Comm. on State Affairs*, 2018 Leg., 85th Interim (Tex. 2018) (written testimony of David Slayton, Admin. Dir., Office of Ct. Admin.).

[201] LEGIS. BUDGET BD., TEXAS STATE GOVERNMENT EFFECTIVENESS AND EFFICIENCY REPORT: SELECTED ISSUES AND RECOMMENDATIONS 294-304 (2013) [hereinafter LBB GEER REPORT], http://www.lbb.state.tx.us/Documents/Publications/GEER/Government%20Effectiveness%20and%20Efficiency%20Report%202012.pdf (last visited Oct. 10, 2018).

[202] OCA NECESSITY STUDY at 2.

[203] *Id.* at 4.

[204] *Id.* at 6.

[205] *Id.*

[206] *Id.*

[207] *See Johnson v. State*, 2018 WL 1476275 (Tex. App.—Houston [14th Dist.] 2018); *Allen v. State*, 2017 WL 5712602 (Tex. App.—Houston [1st Dist.] 2017); *Robison v. State*, 2017 WL 4655107 (Tex. App. – Texarkana 2017); *Hernandez v. State*, 2017 WL 3429414 (Tex. App.—Houston [1st Dist.] 2017); *Casas v. State*, 524 S.W.3d 921 (Tex. App. – Fort Worth 2017); *Salinas v. State*, 523 S.W.3d 103 (Tex. Crim. App. 2017).

[208] *Johnson v. State*, 2018 WL 1476275 (Tex. App.—Houston [14th Dist.] 2018).

be facially unconstitutional.[209] The Texarkana Court of Appeals found an EMS Trauma Fund cost to be facially unconstitutional.[210] The Fort Worth Court of Appeals found the same EMS Trauma Fund unconstitutional.[211] Finally, in *Salinas*, the Texas Court of Criminal Appeals found a consolidated court cost to be facially unconstitutional.[212] In *Salinas*, the Court set a standard: criminal court costs that are collected or expended for a purpose other than a "legitimate [criminal] justice purpose" may be found unconstitutional.[213]

A facial constitutional challenge to a cost or fee is grounded on a separation-of-powers argument.[214] One way the separation-of-powers provision of the Texas Constitution may be violated by one branch of government assuming or delegating a power that belongs to another branch.[215] If a statute turns a court into a "tax gatherer," it forces the court to assume a role more suited to the executive branch.[216] The collection of fees in a criminal case may still be seen as constitutional and a role served for the judicial branch if the statute provides for a specific allocation of the court costs and fees collected to be expended for a "legitimate criminal justice purpose."[217] However, if those costs and fees are not allocated for such a purpose, then the cost or fee constitutes an unconstitutional "tax."[218]

Since the *Salinas* case was handed down, more cases have made their way through the court system. Because of this, many states are reviewing costs and fees collected in criminal cases to ensure that all are tied to a legitimate criminal justice purpose so that they may withstand any facial constitutional challenge in court.

Possible Consolidation

Some advocates believe that streamlining the collection of costs and fees would be an improvement that consolidates some state criminal court costs. Some consolidations could reduce complexity and clarify a criminal defendant's obligations. Criminal court costs and fees generate a large amount of revenue for Texas. On average, court cost collections total $368.2 million per year.[219] Approximately 63.5% of those revenues go directly to general revenue-dedicated accounts and 28.7% are deposited into the General Revenue Fund.[220] Consolidation of some costs and fees could reduce the administrative burden on local court clerks and also lead to improved collection rates. Partial consolidation has been done before in fiscal years 1997 and 2004, but these consolidations did not include every court cost or fee. Since the 2004 consolidation, more costs and fees have been added.[221]

Having multiple state and local court costs and fees that vary by type of criminal offense and class makes it difficult for clerks to assess and collect.[222] Similarly, having all these fees listed in multiple

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[209] *Allen v. State*, 2017 WL 5712602 (Tex. App.—Houston [1st Dist.] 2017); *Hernandez v. State*, 2017 WL 3429414 (Tex. App. –Houston [1st Dist.] 2017).
[210] *Robison v. State*, 2017 WL 4655107 (Tex. App.—Texarkana 2017).
[211] *Casas v. State*, 524 S.W.3d 921 (Tex. App.—Fort Worth 2017).
[212] *Salinas v. State*, 523 S.W.3d 103 (Tex. Crim. App. 2017).
[213] *Id.* at 106.
[214] *Id.*
[215] *Id.* at 106-07.
[216] *Id.* at 107.
[217] *Id.*
[218] *Id.*
[219] LBB GEER REPORT at 294.
[220] *Id.*
[221] *Id.*
[222] *Court Costs & Fees Charge: Hearing Before the S. Comm. on State Affairs*, 2018 Leg., 85th Interim (Tex. 2018) (oral testimony of Teresa Kiel,

different statutory codes makes it more difficult for local governments and state agencies to understand and monitor changes to these costs and fees.[223] Clerks have pointed out that, as cash is the preferred payment method for many criminal defendants, uneven dollar amounts make payment collections even more difficult.[224] Furthermore, Texas does not currently have a formal process by which localities are informed about changes to the costs and fees.[225] All these factors result in local court personnel mistakenly assessing the wrong amount of costs and fees.[226] This can result in the locality being forced to pay the difference back to the State.[227]

The Legislative Budget Board (LBB) made four recommendations with respect to these concerns in its 2013 Report:

- **Recommendation 1:** Amend the relevant statutes to consolidate all state criminal court costs and fees into one assessment per offense class for ordinance violations, Class C misdemeanors, Class A/B misdemeanors, and felonies.
- **Recommendation 2:** Amend statute to consolidate all state and local criminal court costs and fees into one statutory code.
- **Recommendation 3:** Amend statute to authorize a cost of living indexing feature to be added to the state consolidated court cost and include a requirement that all state court costs and fees be set in even dollar amounts.
- **Recommendation 4:** Include a rider in the General Appropriations Bill providing four full-time equivalents to the OCA and directing the agency to provide training to judges, clerks, and other court personnel on court costs and fees.[228]

A more up-to-date study is likely needed to determine if these simplification measures would still be appropriate.[229] A potential barrier to assessing all criminal court costs and fees as one assessment would be that the impact to local governments is not currently measurable by the State.[230]

Updated Changes to Collection Procedures

Last session, Senate Bill 1913 was passed, which modified the procedure for court costs and fees to be assessed, but did not change the structure.[231] The primary changes to the law were threefold: 1) courts must now provide notice to criminal defendants that they have alternatives to payment in a situation in which a defendant is unable to pay without undue hardship; 2) courts must now also provide a defendant with an opportunity to get back into compliance for failure to pay prior to an issuance of an arrest warrant for failure to pay; and 3) courts must assess a defendant's ability to pay

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Guadalupe Cnty. Clerk, Cnty. & Dist. Clerks Assoc. of Tex.).

[223] Tex. S.B. 1913, 85th Leg., R.S. (2017) (codified as an amendment to Tex. Code Crim. Proc., Art. 14.06(b)). LBB GEER REPORT at 294.

[224] *Id.*

[225] *Id.*

[226] *Court Costs & Fees Charge: Hearing Before the S. Comm. on State Affairs*, 2018 Leg., 85th Interim (Tex. 2018) (oral testimony of Teresa Kiel, Guadalupe Cnty. Clerk, Cnty. & Dist. Clerks Assoc. of Tex.).

[227] *Court Costs & Fees Charge: Hearing Before the S. Comm. on State Affairs*, 2018 Leg., 85th Interim (Tex. 2018) (oral testimony of Julie Farney, Tax Auditor, Comptroller of Pub. Accts.).

[228] LBB GEER REPORT at 294-95.

[229] *Court Costs & Fees Charge: Hearing Before the S. Comm. on State Affairs*, 2018 Leg., 85th Interim (Tex. 2018) (oral testimony of David Slayton, Admin. Dir., Office of Ct. Admin.).

[230] *Id.*

[231] *Id.*

at sentencing and tailor his or her payments based on ability to pay.[232]

After implementation of Senate Bill 1913, the overall revenue collected from criminal court costs and fees has increased by approximately 7% across the board.[233] The increase may be attributed to the fact that judges are working with criminal defendants to tailor a plan that they can achieve versus the defendant's defaulting and paying nothing.[234] Furthermore, warrants for failure to pay and failure to appear have declined; the number of defendants being jailed for failure to pay has declined; defendants satisfying their obligation by community service has increased; and the number of cases where there are waivers for indigence have increased.[235] Overall, the outcome of the new law has been positive.

Recommendations

Moving forward, the legislature should ensure that a thorough review of all court costs and fees is conducted. The review should ascertain which costs and fees do not have a stated statutory purpose. It should also ascertain if any revenue from criminal court costs and fees is being directed toward functions which may not be considered legitimate criminal justice purposes. Additionally, the legislature should collaborate with OCA to develop a method to simplify the current court cost and filing fee structure to reduce the difficulty of administration by clerks. As part of this process, the legislature should work with OCA to gather information that would show the fiscal impact of these changes on local and state revenue which could in turn improve efficiency.

The legislature should also seek to simplify the court cost and filing fee structure by limiting the number and differentiation of costs and fees. Establishing a mechanism to regularly review these costs and fees would ensure that they are appropriate and that they maintain a simplified structure. Finally, working preemptively, the legislature should ensure that newly enacted costs and fees are used for a legitimate justice purpose and that the costs and fees are structured in such a way to reduce complexity. These statutory revisions and simplifications may reduce the inefficiencies of the justice system and greatly improve the court cost and fee structure throughout the state.

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[232] *Id.*
[233] *Court Costs & Fees Charge: Hearing Before the S. Comm. on State Affairs*, 2018 Leg., 85th Interim (Tex. 2018) (written testimony of Office of Ct. Admin.).
[234] *Court Costs & Fees Charge: Hearing Before the S. Comm. on State Affairs*, 2018 Leg., 85th Interim (Tex. 2018) (oral testimony of David Slayton, Admin. Dir., Office of Ct. Admin.).
[235] *See supra* note 235.

Charge No. 9

Campus Free Speech: *Ascertain any restrictions on Freedom of Speech rights that Texas students face in expressing their views on campus along with freedoms of the press, religion, and assembly. Recommend policy changes that protect First Amendment rights and enhance the free speech environment on campus.*

Background

Over the past few years, the status of free speech at colleges and universities has been a contentious issue nationwide. Two principal pillars of democracy are equality and individual liberty. However, these two principles can sometimes be in tension with each other. President Thomas Jefferson discussed this tension in his First Inaugural Address in 1801: "[T]hough the will of the majority is in all cases to prevail, that will, to be rightful, must be reasonable. . . [because] the minority possess their equal rights, which equal laws must protect, and to violate would be oppression." The First Amendment to the United States Constitution protects speech and expression not favored by the current majority.[236] In fact, the First Amendment protects speech no matter how offensive the content. Accordingly, restrictions on speech content by colleges and universities potentially violate the very principals our Constitution was build on.

The right to free speech is not just about the law; it's also a vital part of our civic education, especially at higher education institutions. As Supreme Court Justice Robert Jackson wrote in 1943 about the role of schools in our society: "That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." These constitutional values, including free expression, should be an essential mission of any college or university.[237]

Furthermore, the United States Supreme Court has called colleges and universities "the marketplace of ideas" and reaffirmed the country's dedication to safeguarding academic freedom.[238] However, there appears to be a trend sweeping the nation that attempts to undermine these values. This trend has developed into the idea that we should protect higher education students from ideas that might upset them by censoring speech. While this trend may not be sweeping Texas colleges and universities, it certainly is making the state of Texas take notice. In fact, Texas colleges and universities, in general, have bucked this nationwide trend for the most part. Accordingly, there has not been systematic litigation in Texas stemming from canceling invited speakers because of their viewpoint or restricting free speech on campus.[239] But, like any contested issue, Texas colleges and universities still have room to improve. Up to now, First Amendment legislation in Texas has mainly focused on protections for public education K-12 students, such as protecting religious expression, the right to pray, and the freedom to organize religious groups.[240] But, it is important to understand

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[236] Tom Lindsay, *Campus Free-Speech Disruptions Test Our Democratic Faith*, FORBES (Jan. 18, 2018), https://www.forbes.com/sites/tomlindsay/2018/01/18/campus-free-speech-disruptions-test-our-democratic-faith/#3113cc6776b5.
[237] *Speech on Campus*, ACLU, https://www.aclu.org/other/speech-campus (last visited Aug. 9, 2018).
[238] *Healy v. James*, 408 U.S. 169, 180 (1972).
[239] *Campus Free Speech Charge: Hearing Before the S. Comm. on State Affairs*, 2018 Leg., 85th Interim (Tex. 2018) (testimony of Brantley Starr, Deputy First Asst. Att'y Gen.).
[240] TEX. EDUC. CODE §§ 25.151; 25.153; 25.154; 25.156; and 25.901.

that there are differences between K-12 students and higher education students because the Constitution has been interpreted to afford greater liberties to higher education students.[241]

Discussion

The First Amendment to the United States Constitution "guarantees freedoms concerning religion, expression, assembly, and the right to petition."[242] Over the years, the U.S. Supreme Court recognized that the First Amendment does not protect six very narrow categories: 1) speech that incites reasonable people to immediate violence; 2) fighting words; 3) harassment; 4) true threats; 5) obscenity; and 6) defamation.[243] The U.S. Supreme Court views these six categories narrowly for good reason. If these categories were viewed expansively, it may place an unreasonable restriction on speech and expression.

In *Brandenburg v. Ohio*, the Supreme Court held that the government cannot punish inflammatory speech unless it intentionally and effectively provokes a crowd to immediately carry out violent and unlawful action.[244] This is a very high bar to meet. The First Amendment's robust protections in this context reflect two fundamentally important values. First, political advocacy — rhetoric meant to inspire action against unjust laws or policies, which is essential to democracy. Second, people should be held accountable for their own conduct, regardless of what someone else may have said. To protect these values, the First Amendment allows flexibility for chaotic, passionate, and even bigoted speech that may be a part of politics.

Moreover, although the Supreme Court ruled in 1942 that the First Amendment does not protect "fighting words," this narrow exception does not apply to those addressing large audiences on campus, regardless of how hateful the speech may be.[245] For this reason, the Court also ruled that government cannot inhibit speech that is likely to provoke a hostile reaction; that is, the Court has ruled against the "heckler's veto." Preventing authorized speakers from talking is not protected by the First Amendment. Unfortunately, we are seeing protesters employ this tactic more recently on college campuses; sometimes referred to as a "heckler's veto". When campus authorities or police allow dissenters to drown out someone's speech or prevent someone from speaking, they are allowing protesters to silence that speaker and thereby failing to protect the constitutional rights of both the speaker and the audience.

Last year, the heckler's veto occurred at institutions including Middlebury College, University of California (UC) at Berkeley, Claremont McKenna College, New York University, Columbia University, University of Buffalo, University of California at Irvine, and Northwestern University.[246] We have also seen iterations of the heckler's veto in the state of Texas; most recently at Texas Southern University, where State Representative Briscoe Cain had an on-campus speaking event disrupted by protesters.[247] Although the student organization that sponsored Representative Cain did not strictly adhere to university policies when inviting him to speak, no speaker should be prevented

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[241] *See supra* note 133.
[242] U.S. CONST. amend. I.
[243] *See supra* note 133.
[244] *Brandenburg v. Ohio*, 395 U.S. 444 (1969).
[245] *See supra* note 131.
[246] *Campus Free Speech Charge: Hearing Before the S. Comm. on State Affairs*, 2018 Leg., 85th Interim (Tex. 2018) (written testimony of Manuel Escobar, Anti-Defamation League).
[247] *Id.*

the opportunity to speak merely because of their political beliefs or affiliation. As the American Civil Liberties Union (ACLU) argues, "without this vital protection, government officials could use safety concerns as a smokescreen to justify shutting down speech they don't like. . . . Instead, the First Amendment requires . . . taking reasonable measures to ensure that speakers are able to safely and effectively address their audience."[248] It is the main reason the United States ensures that the free exchange of ideas is uninhibited, robust, and wide-open.

The Supreme Court has also ruled that hate speech is protected, most recently in its 2017 decision in *Matal v. Tam*. Justice Kennedy wrote: "A law found to discriminate based on viewpoint is an 'egregious form of content discrimination,' which is 'presumptively unconstitutional.' . . . A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all."[249] Kennedy's observation ties directly back to our democratic faith in free debate at both public universities and in a public forum. Governing majorities come and go, and with them come and go political opinions. But while many among us might not share the same political opinions, even to the point of regarding the opposition as "hateful", what Americans all share is a desire for alternative opinions to be heard and debated. Without such protection, we run the risk that our suppression of others' speech during which we are the majority turning against us in the future, when we find ourselves in the minority.

As it relates to colleges and universities, the U.S. Supreme Court has spoken on the issue of campus free speech in a number of cases. There is no constitutional or statutory right to not be offended; however, there is a constitutional right to speak. Although the First Amendment does not force government to provide a speaker's platform to anyone, it does prohibit government from discriminating against speech based on the speaker's viewpoint.[250] Therefore, while no public colleges or universities are legally obliged to fund student publications, the Supreme Court has ruled that when a public university opts to provide such funds, it cannot then refuse them for those student periodicals that defend a viewpoint currently out of favor with the ruling majority.[251] Because Texas public colleges and universities are agencies of the state of Texas, they are as obligated to uphold the First Amendment as any other government agency. For this reason, while administrators are free to invite whomever they choose to appear and speak on campus, they are constitutionally prohibited from mandating which speakers student groups may decide to invite on their own. Furthermore, if a college or university usually allows students to use campus resources, such as auditoriums, to entertain guests, the school cannot withdraw those resources simply because students have invited a controversial speaker to campus. To do otherwise, says the Supreme Court, constitutes viewpoint discrimination.[252] As more court cases make their way through the legal system nationwide, undoubtedly, the Court will opine on more issues directly relating to campus free speech.

Commentators point to five threats to First Amendment rights on college campuses nationwide:

1. Speech codes — policies that regulate student speech based on its content or viewpoint.

2. Speech zones — restrict where students may speak on campus.

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[248] *See supra* note 130.
[249] *Id.*
[250] *Id.*
[251] *Id.*
[252] *Id.*

3. Denial of associational rights — some colleges and universities, under the banner of nondiscrimination, prohibit student groups from requiring that group leaders believe in the group's message.

4. Denial of equal access to forums and resources — while the Supreme Court declared in 1981 (*Widmar v. Vincent*) that public universities must provide all student groups equal access to facilities and resources, student groups continue to experience discrimination when it comes to equal access and resources due to their views.

5. Faculty rights — threats to free speech can also reach faculty, who can see their scholarship and research restricted.[253]

Because First Amendment threats still exist on some college campuses around the country, many advocates, state legislators, and even boards of regents, have attempted to curb these potential threats. For example, in 2017, the Goldwater Institute introduced the Campus Free Speech Act. The Campus Free Speech Act is a model bill designed to ensure free expression within public university systems. The key provisions in this model legislation were inspired by three classic defenses of campus free speech: 1) Yale's 1974 Woodward Report; 2) The University of Chicago's 1967 Kalven Report; and 3) the University of Chicago's 2015 Stone Report. The Goldwater Institute model legislation does several things:

- It creates an official university policy that strongly affirms the importance of free expression, nullifying any existing restrictive speech codes in the process.

- It prevents administrators from disinviting speakers whom members of the campus community wish to hear from, no matter how controversial.

- It establishes a system of disciplinary sanctions for students and anyone else who interferes with the free speech rights of others.

- It allows persons whose free speech rights have been improperly infringed by the university to recover court costs and attorney's fees.

- It reaffirms the principle that universities, at the official institutional level, remain neutral on issues of public controversy to encourage the widest possible range of opinion and dialogue within the university itself.

- It ensures that students will be informed of the official policy on free expression.

- It authorizes a special subcommittee of the university board of trustees to issue a yearly report to the public, the trustees, the governor, and the legislature on the administrative handling of free speech issues.[254]

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[253] *See supra* note 133.

[254] Jim Manley, *Campus Free Speech: A Legislative Proposal*, GOLDWATER INST. (Jan. 30, 2017), https://goldwaterinstitute.org/article/campus-free-

The ultimate goal of proposals such as the Campus Free Speech Act is to create a system designed to encourage students and administrators to respect and protect the free expression of others. Similar proposals are being reviewed across the country. In fact, North Carolina has already passed a comprehensive campus free speech law.[255] Furthermore, as a similar bill moves through the legislature in Wisconsin, the University of Wisconsin System Board of Regents took the initiative to adopt the Goldwater Institute's model as policy for their university system. Wisconsin's "Campus Free Speech Act" even calls for the suspension or expulsion of students who disrupt approved campus speakers.[256] Under their policy, students enrolled in the University of Wisconsin System would face a disciplinary hearing if they engage in disruption. If the hearing concludes that a student has "interfer[ed] with the expressive rights of others," the student would be suspended for at least one semester. Additional violations may result in the student's expulsion.[257] Like-minded legislation has already passed in Colorado and is being considered in Michigan, California, and Virginia. An example of similar legislation in Texas was Senate Bill 1151, which failed to pass during the 85th legislative session.[258]

There are many complexities though when it comes to enabling free speech on campus. Protecting free speech on campus in today's climate has put tremendous fiscal pressures on colleges and universities. For example, in a typical year, UC Berkeley, allocates around $200,000 to pay for security at campus protests.[259] UC Berkeley spent triple that amount, $600,000, in one night when conservative speaker Ben Shapiro recently spoke on campus.[260] While large institutions may be able to withstand these expenses temporarily, smaller colleges and universities may not have the financial resources to provide for adequate security. Because of this, some colleges and universities elect to charge the sponsoring organization a security fee to recoup any exuberant costs. Because there is no specific appropriation to address the costs of speaking events or protests, many institutions evaluate the attendance and complexity of an event and charge for security accordingly. However, institutions must be mindful that fees charged to the sponsoring organization cannot amount to an infringement upon the First Amendment rights of students. Furthermore, the fees imposed cannot vary based on the content of the speech or the expected reaction. To do so would constitute content discrimination and potentially violate the First Amendment. To further complicate matters, the current law is unclear about how much a university must be willing to spend in order to protect that right. Because of these financial challenges, colleges and universities seek a long-term strategy for paying for security. Some assert the only way to fully protect the right at all colleges and universities is to have state funding specifically earmarked for increased costs associated with controversial speakers and rallies.[261]

College students' sometimes inconsistent or conflicting opinions on free speech issues underscore the challenges and complexities that can arise between respecting student rights and making sure all students feel safe and respected on campus. Because opinions across the student body, administrators, and even the public vary greatly, the balance between enabling free speech and providing a safe

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speech-a-legislative-proposal/.

[255] *Id.*

[256] Tom Lindsay, *To Restore Campus Free Speech Nationwide, Secretary DeVos Should Look to Wisconsin*, FORBES (June 29, 2017), https://www.forbes.com/sites/tomlindsay/2017/06/29/to-restore-campus-free-speech-nationwide-secretary-devos-should-look-to-wisconsin/#450e082d165e.

[257] *Id.*

[258] Tex. S.B. 1151, 85th Leg., R.S. (2017).

[259] *See supra* note 140.

[260] *Id.*

[261] *Id.*

environment has become increasingly challenging for colleges and universities. The First Amendment does not protect behavior on campus that crosses the line into targeted harassment or threats, but merely offensive speech does not rise to that level, and determining when conduct crosses that line is a legal question that requires examination on a case-by-case basis. Because each case in unique and presents its own set of potential challenges, college administrators may look to restrict speech as a quick fix to address campus tensions but real social change comes from persistent efforts to address the underlying causes of inequality and bigotry. What better place for students to learn these realities than on a college campus.

Recommendations

As public awareness of the campus threats to free speech grows, bipartisan consensus on upholding the First Amendment may grow as well. Improving campus climate, both for those speaking and for those listening, can only result from a commitment to civility, dialogue, and education. If Texas is going to continue to lead in higher education and foster the next generation of leaders, colleges and universities need to invigorate the marketplace of ideas on campus by protecting the free speech rights of all college students.

Although protecting free speech rights on campus has put fiscal pressures on some colleges and universities, there should be no monetary barrier to uphold the First Amendment to the United States Constitution. In order to strictly adhere to the First Amendment, institutions need to thoroughly review policies relating to fees charged for an approved invited speaker to ensure fees do not abuse the First Amendment rights of students. Thus, public universities and colleges must be fiscally responsible with any budget reserves and work diligently with the Texas Legislature to ensure it has the appropriate funding to adequately and efficiently carry out its mission.

Texas colleges and universities' mission should embody an environment that fosters tolerance and mutual respect among members of the campus community, an environment in which all students can exercise their right to participate meaningfully in campus life without being subject to discrimination. Because of this, colleges and universities need to vigilantly defend the equal rights of all speakers and all ideas to be heard, and promote a climate of robust dialogue and debate open to all views, no matter how controversial. Presenters and protesters can both be heard without one infringing upon the rights of the other. Campus policies should reflect this, and administrators must act to prevent speakers and listeners from being deprived of their constitutional rights.

Charge No. 10

Religious Liberty: *Monitor the implementation of legislation that protects citizens' religious freedoms, including Senate Bill 24 (sermon safeguard) and House Bill 555 (religious liberty of county clerks), and make recommendations for any legislation needed to ensure that citizens' religious freedoms are not eroded by local ordinances or state or federal law.*

Background

Religious liberties form the first freedom in the United States Bill of Rights. The First Amendment prevents government from infringing on the free exercise of religion or establishing a religion. The First Amendment reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[262] The First Amendment protects religious liberty in two ways. The first protection is known as the Establishment Clause, which states "Congress shall make no law respecting an establishment of religion." This clause enshrines the principle typically referred to as "separation of church and state."[263] By prohibiting our government from establishing an official state religion, the Establishment Clause ensures that we have the absolute right to decide for ourselves which faith to follow. Many assert that the Establishment Clause also guards against the civic divisiveness that arises when the government takes sides in religious debates because religious strife of this nature can threaten the viability of a democratic society.[264] The second religious liberty protection found in the First Amendment is known as the Free Exercise Clause. It reads, "Congress shall make no law…prohibiting the free exercise thereof…" This clause enshrines the principle referred to as "liberty of conscience"; the right to choose what one believes in matters of religion.[265] The Free Exercise Clause also limits the power of government to interfere with religious practice by compelling the affirmation of favored religious beliefs, punishing the expression of disfavored religious doctrines, or imposing special disabilities on the basis of religious views or religious status.[266]

In Texas, we have a proud tradition of ensuring the right of every person to follow his or her conscience without fear of government intrusion. The Texas Constitution proclaims that "[a]ll men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences," and provides that "[n]o human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion, and no preference shall ever be given by law to any religious society or mode of worship."[267]

In 1993, United States Congress passed the Religious Freedom Restoration Act (RFRA), which

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[262] U.S. CONST. amend. I.
[263] *Religious Liberty Interim Charge: Hearing Before the S. Comm. on State Affairs*, 2016 Leg., 84th Interim (Tex. 2016) (written testimony of Joshua Houston, Texas Impact).
[264] *Religious Liberty Interim Charge: Hearing Before the S. Comm. on State Affairs*, 2016 Leg., 84th Interim (Tex. 2016) (written testimony of Rebecca Robertson, ACLU of Texas).
[265] *See supra* note 157..
[266] *Id.*
[267] TEX. CONST. art. I, § 6.

ensures that interests in religious freedom are protected.[268] Specifically, RFRA prohibits any agency, department, or official of the United States or any State (the government) from substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability, except that the government may burden a person's exercise of religion only if it demonstrates that application of the burden to the person: (1) furthers a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.[269] At the time, RFRA was noncontroversial and passed the House of Representatives on a voice vote and the Senate 97-3.[270]

However, RFRA was held unconstitutional by the United States Supreme Court, as applied to the states in the *City of Boerne v. Flores* decision in 1997, which ruled that RFRA is not a proper exercise of Congress' enforcement power.[271] In the *City of Boerne v. Flores* decision, a majority found that Congress had exceeded its constitutional powers by enacting RFRA because Congress could not determine the way in which states enforce RFRA's restrictions. Regardless of that ruling, RFRA continues to be applied to the federal government. In response to *City of Boerne v. Flores* and other related RFRA issues, twenty-one individual states have passed RFRAs that apply to state governments and local municipalities.[272]

Texas passed its RFRA, the Texas Religious Freedom Restoration Act (Texas RFRA), in 1999 as Senate Bill 138.[273] Like the RFRA of 1993, Texas RFRA had broad support across the political spectrum. Senate Bill 138 was adopted on a voice vote in the House of Representatives and passed unanimously in the Senate.[274] The Texas law passed with overwhelming bipartisan support because conservatives and progressives agreed on the premise that religious accommodation is appropriate where the rights of others are not impinged. The Texas RFRA strikes a careful balance between protecting people's ability to practice their faiths freely and ensuring that laws needed to protect everyone apply to all persons equally, regardless of personal beliefs.

Discussion

Recently, certain courts and governmental bodies have made laws and rulings that undermine Americans' religious liberties. These challenges to religious liberty harm not only those of religious faith, but are a potential threat to the freedom of conscience for all Americans. As a result, dozens of states have created some form of RFRA protection. Thus, because of the recent challenges on religious liberty, states are taking the necessary steps to ensure that the government does not force individuals, organizations, or businesses to violate their sincerely held religious beliefs.

The Texas Legislature has taken steps to protect the religious liberties of all Texans. In 2017, the 85th Legislature passed Senate Bill 24, relating to a privilege from disclosure to governmental units for

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[268] H.R. 1308, 103rd Cong. (1993-1994) (enacted).
[269] *Id.*
[270] *See supra* note 162.
[271] *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997).
[272] *Religious Liberty Interim Charge: Hearing Before the S. Comm. on State Affairs*, 2016 Leg., 84th Interim (Tex. 2016) (testimony of Brantley Starr, Deputy First Assistant Att'y Gen., Office of the Tex. Att'y Gen.).
[273] Tex. S.B. 138, 76th Leg., R.S. (1999).
[274] S.B. 138, 1999 Leg., 76th Reg. Sess. (Tex. 1999).

certain evidence concerning sermons delivered by a religious leader.[275] Senate Bill 24 prohibits a governmental entity from compelling the production or disclosure of a written copy or audio or video recording of a sermon delivered by a religious leader during religious worship in any civil proceeding to which the governmental entity is a party. This bill also prohibits a governmental entity from compelling a religious leader to testify regarding the sermon. Senate Bill 24 was narrowly tailored to protect religious leaders' First Amendment rights and prevent government overreach and intimidation. Many legal expects assert that Senate Bill 24 is a model piece of legislation to protect religious liberties because it was tailored towards addressing a specific violation and is unlikely to result in any unintended consequences or unnecessary litigation.[276] Legislation that can strike this balance is actually widely supported among all Texans, as illustrated by a 170-2 vote in the Texas Legislature.

Another bill passed during the 85th Legislature is House Bill 555, which addresses the religious liberty protections for county clerks.[277] As a result of the U.S. Supreme Court ruling in *Obergefell v. Hodges*, certain county clerks have raised concerns regarding their sincerely held religious beliefs.[278] Specifically, these clerks feel that it is in violation of their sincerely held religious beliefs to sign marriage licenses for certain individuals as part of their employment. In efforts to address these concerns, deputy clerks regularly sign marriage licenses for individuals with whom the county clerk might have religious objections. That said, in most, if not all counties, the official marriage license form still has the county clerk's name on it, regardless of whether the clerk is the county employee who actually signs the license. House Bill 555 addresses this specific occurrence by stating that a county may not specify the name of the county clerk on marriage license forms, but must still identity the county in which the license is issued. The license would still include the signature and title of the county employee who actually signs the license, whether that be a clerk or a deputy clerk, but the county clerk's name may no longer appear as part of the standard template for the license form. Thus far, only two Texas counties have completely removed the county clerk's name from the marriage license template.[279] House Bill 555 was also greatly supported by a vote of 147-28 in the Texas Legislature because it too provided a reasonable solution to address the concerns of county clerks upholding their sworn duties while also preserving their sincerely held religious beliefs.

These bills are examples of the state affirming the First Amendment religious liberty protections for all Texans. Narrowly tailored bills addressing religious liberty protections have been extremely effective and do not result in litigation that costs the state millions of dollars. Even though the Texas Legislature has already acted to protect religious liberties, there are other areas where the Legislature may consider enacting legislation to clarify and ensure that the government does not violate sincerely held religious beliefs of any individual, organization, or business. Attorney General Ken Paxton has set forth several such topics to the Legislature:

1. Religious organizations should not be forced to compromise their religious beliefs when making staffing and housing decisions.

2. Faith-based adoption and foster care agencies should be free from discrimination based on

[275] Tex. S.B. 24, 85th Leg., R.S. (2017).
[276] *Religious Liberty Interim Charge: Hearing Before the S. Comm. on State Affairs*, 2018 Leg., 85th Interim (Tex. 2018) (testimony of Joshua Houston, Texas Impact).
[277] Tex. H.B. 555, 85th Leg., R.S. (2017).
[278] *Obergefell v. Hodges*, 135 S.Ct. 2071 (2015).
[279] *Religious Liberty Interim Charge: Hearing Before the S. Comm. on State Affairs*, 2018 Leg., 85th Interim (Tex. 2018) (testimony of Teresa Kiel, Cnty. & Dist. Clerks Assoc. of Tex.).

their religious beliefs.

3. The accreditation of religious schools should not be revoked due to the school's sincerely held religious beliefs.

4. Tax assessors should not revoke religious tax accommodations based on religious beliefs.

5. Religious beliefs when providing counseling should be protected.

6. Small businesses and closely held corporations should not be required to provide goods or services for weddings that violate their sincerely held religious beliefs.

7. Judges and other officiants should not be forced to perform weddings that violate their sincerely held religious beliefs.

8. The State should not, in the process of complying with the United States Supreme Court's ruling in *Obergefell v. Hodges*, needlessly trample the religious liberties of State and local government employees.

9. Public school, college or university students' retain their constitutional freedom to speak their religious beliefs, to associate with others of similar religious beliefs, and to not be compelled to participate in religious practices contrary to their religious beliefs.

10. Discrimination laws and ordinances should be uniform across the State.[280]

These are just a few specific areas that the Texas Attorney General has pointed out as possibly needing clarification from the Legislature to avoid future litigation and ensure religious liberty protections are affirmed. Furthermore, in the Committee's February 21, 2018 hearing, interested parties asserted that future legislation to broaden religious freedom protections should also include protections for students attending public colleges and universities, protecting religious staffing rights, protecting occupational licensing rights and healthcare conscience rights, and protecting faith-based pregnancy centers from local government encroachment.[281] During the 85th Legislative Session, several bills were filed that addressed these very areas. Constitutional law and federal and state RFRA laws provide generic protections, often requiring a lengthy court battle to determine whether the government has unconstitutionally burdened religious expression.[282] Because of this, the Legislature may wish to continue to enact more specific protections, similar to Senate Bill 24 and House Bill 555 from the 85th Legislature, in order to avoid lengthy and expensive legal battles. Legal authorities, like the Texas Attorney General, assert that targeted legislation provides the clearest protection of religious liberty, reduces uncertainty, and prevents litigation.

Several municipalities in Texas have enacted ordinances that grant protection beyond federal and state law. In state law, protected classes include race, color, disability, religion, sex, national origin, and age. Protected classes do not include sexual orientation, military status, marital status, or gender

[280] *Id.*
[281] *Religious Liberty Interim Charge: Hearing Before the S. Comm. on State Affairs*, 2018 Leg., 85th Interim (Tex. 2018) (testimony of Chelsey Youman, First Liberty Inst.).
[282] *See supra* note 168.

identity. These local ordinances are starting to draw more legal challenges and attention statewide. Many assert that these ordinances are costly to taxpayers and are divisive local initiatives. Because these local ordinances protect classes beyond state law, many religious organizations believe that the Legislature should require that any local discrimination ordinance conform to the protected classes set forth in state law. Certain religious organizations assert that such ordinances infringe on religious liberty and personal safety. Because local governments have enacted ordinances granting more or less protection than in state or federal law, the Legislature may consider providing uniformity because each ordinance interacts with the Texas RFRA differently and presents legal conflicts that must be resolved by the courts. Often times, a patchwork of local ordinances may present challenges for businesses that do not wish to be involved in litigation nor run afoul of federal, state, or local laws. This lack of uniformity may create difficulties for many businesses that operate in different areas of the state. Many businesses prefer laws that are uniform across the state and understand that religious freedom is a fundamental value that their employees cherish. Other states are seeking to address infringement on religious liberty by enacting targeted protections to provide uniformity in state law.

Recommendations

The Legislature should continue to ensure that the government does not force individuals, organizations, or businesses to violate their sincerely held religious beliefs. The First Amendment rights of all Texans must be protected. In order to avoid lengthy and costly litigation, the Legislature should enact targeted religious liberty protections designed to address specific violations of an individual, business, or organization's sincerely held religious belief.

Charge No. 11

Monitoring Charge: *Monitor the implementation of legislation addressed by the Senate Committee on State Affairs during the 85th Legislature, Regular Session, and make recommendations for any legislation needed to improve, enhance, and/or complete implementation. Specifically, monitor the following: 1) Implementation of Senate Bill 2190, relating to the public retirement systems of certain municipalities; 2) Implementation of House Bill 3158, relating to the retirement systems for and the provision of other benefits to police and firefighters in certain municipalities; 3) Implementation of House Bill 3976, relating to the administration of and benefits payable under the Texas Public School Retired Employees Group Benefits Act; and 4) Implementation of Senate Bill 16, relating to decreasing the fee for the issuance of a license to carry a handgun.*

Implementation of Senate Bill 2190

Background

In the City of Houston (City), there are three public pension systems for its public workers. The public pension systems include the Houston Police Officers Pension System (HPOPS), Houston Municipal Employees Pension System (HMEPS), and the Houston Firefighters Relief and Retirement Fund (HFRRF). HPOPS, HMEPS, and HFRRF are created and governed by Texas statute.[283] Each pension system is a defined benefit plan, which guarantees retiree benefits based on years of service and salary. Prior to the 85th Legislature, the City bore the financial risk of such plans and was obligated to fund the pension systems to pay each retiree's defined benefit regardless of the pension system's financial health.

The three pension systems are funded from City contributions, employee contributions, and investment earnings. Prior to the 85th Legislature, each of the pension systems was underfunded. Based on the City's actuarial estimates of the liability immediately before the 85th Legislature, HMEPS was underfunded by approximately $3.2 billion, HPOPS was estimated to be underfunded by approximately $3.4 billion, and HFRRF was estimated to be underfunded by approximately $1.5 billion, for a total of $8.1 billion.[284] As of the pension systems' actuarial valuation reports prior to the 85th Legislature, the funded ratios were 54.2 percent for HMEPS, 77.5 percent for HPOPS, and 89.4 percent for HFRRF. The HMEPS and HPOPS unfunded liabilities were a result of actuarial assumptions and investment losses, but also the result of reduced City contributions under meet and confer agreements over an extended period of time. The HFRRF unfunded liability was solely the result of investment and other actuarial losses as the City made its required contributions to the system.

For the financial stability of the City and pension systems, significant reforms were required. Without reform of the pension plans, the City would not have been able to provide for both new pension costs (the normal costs) and the legacy liability, except by significantly reducing City services or increasing tax revenues and service charges. Because of the impending financial crisis, the City was obligated to work with the pension systems and legislature to craft a reform plan that would stabilize the financial outlook of not only the City, but the pension systems as well.

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[283] TEX. REV. CIV. STAT. arts. 6243e.2(1), 6243g-4, and 6243h (Vernon 2010; Vernon Supp. 2016).
[284] *Monitoring Charge: Hearing Before the S. Comm. on State Affairs*, 2018 Leg., 85th Interim (Tex. 2018) (testimony of Melissa Dubowski, Asst. Dir.- Finance Dep't, City of Houston).

Discussion

In order to address the looming financial crisis, the 85th Legislature enacted Senate Bill 2190. The City's unfunded pension obligations were estimated to be approximately $8.1 billion, which more than doubled over the last three years. In fact, according to Moody's, Houston has the fourth largest pension debt relative to its revenues in the country, only behind cities like Chicago and Dallas.[285] Because the situation was becoming unsustainable and straining the City's finances, it put the City at risk of not meeting its pension obligations in the future. This would have been detrimental to both the City's taxpayers and the pension systems. Senate Bill 2190 addressed these challenges by proposing significant reforms to the pension systems to reduce costs and ensure the City met its future pension obligations.

Collectively, based on the City actuarial firm's current estimates changes to benefits and increases in employee contributions will reduce the combined legacy liability from approximately $8.1 billion to approximately $5.1 billion.[286] Merely by enacting the reforms in Senate Bill 2190, the legacy liability was drastically cut, putting the City in a far better position to meet its pension obligations moving forward. Even more importantly, it further secured the pensions for the hardworking employees and retirees of the City.

Benefit Reforms

Retirement Age. By increasing the age at which an employee can retire with full benefits, pension costs are reduced. Senate Bill 2190 increased the retirement age for HPOPS and HFRRF members.

Benefit Accrual. By reducing the amount of benefits accrued in each year, pension costs are reduced. Senate Bill 2190 prospectively reduced the accrued benefits for HFRRF beginning with the effective date of the bill.

Salary Included for Payment of Benefits. The ultimate pension benefit paid is based on salary earned. By reducing the types of pay included in salary for pension benefit calculations, pension costs are reduced. Senate Bill 2190 excluded overtime pay for HFRRF (which is already excluded for HMEPS and HPOPS) and adjusted the salary for certain appointed positions for HFRRF and HPOPS.

COLA Costs. Pension costs are reduced by temporarily suspending cost-of-living adjustments (COLA) for certain retirees, decreasing the minimum guaranteed COLA, and increasing the age at which COLA increases begin. Senate Bill 2190 suspended COLA increases for certain existing retirees for three years for HPOPS, one year for HMEPS, and three years for HFRRF. In addition, the minimum guaranteed COLA for future benefits was reduced, and the age at which COLAs begin for retirees increased from no minimum age to age 55 for HPOPS, age 48 to age 50 for HMEPS, and age 48 to age 55 for HFRRF retirees.

DROP Accounts. Senate Bill 2190 substantially changed the Deferred Retirement Option Plans (DROP) for active employee members of HFRRF and HPOPS. DROP allows an active employee to be paid a salary and have the pension benefit the employee would have received as a retiree credited

[285] Meaghan Kilroy, *Moody's: Local Government Pension Liabilities Soar in Fiscal Year 2016*, PENSIONS & INVESTMENTS (Dec. 19, 2017, 2:06 PM), http://www.pionline.com/article/20171219/ONLINE/171219806/moodys-local-government-pension-liabilities-soar-in-fiscal-year-2016.
[286] *Id.*

to the DROP account. Credited benefits accumulate and are paid to the employee as a lump sum, with attributed earnings and with COLA increases, if any, at the end of the DROP period. Earnings may reflect actual earnings of the pension fund, but the DROP payment is guaranteed by the pension system, and ultimately the City. Senate Bill 2190 reduced DROP costs in four principal ways:

- Reduction of DROP availability by restricting entry into DROP and reducing the period an employee can participate in DROP. Ultimately, DROP will end for all pension systems.
- Reducing DROP earnings on amounts credited to a member's DROP account to better reflect actual earnings on the pension funds.
- Eliminating COLAs for monthly pension payments credited to DROP accounts.
- During DROP participation, the required DROP participant salary contributions to the pension systems will be deposited to the pension funds instead of credited to DROP accounts.

Employee Contributions. Senate Bill 2190 increased employee contributions for all three pension plans. The contribution for active HFRRF and HPOPS members was increased to 10.5 percent of salary. The contribution for HMEPS members, which is divided into three separate groups based on hire date, is now 8.0 percent for Group A, 4 percent for Group B, and 3 percent for Group D. The contribution increases for HMEPS members will be phased-in over a two-year period.[287]

Legacy Liability and New Pension Costs

The amount of the legacy liability resulted from actuarial assumptions, the deferral of payments pursuant to meet and confer agreements, and investment performance, was estimated at $8.1 billion prior to the 85th Legislature. One of the primary purposes of Senate Bill 2190 was to require that the City amortize the legacy liability over a fixed 30-year period, much like the payment of a home mortgage, and guarantee future contributions by the City of amounts required for new pension costs.

Pension Bonds

As part of Senate Bill 2190, the City, HMEPS, and HPOPS agreed that the City may issue pension obligation bonds to reduce the legacy liability. Issuing bonds would replace the obligation to pay the legacy liability with an obligation to pay bonded indebtedness. The infusion of cash from bond proceeds provides liquidity to the two pension systems with the lowest funding ratios: HPOPS and HMEPS. Furthermore, Senate Bill 2190 stipulated that the pension bonds would not be issued unless the bonds were approved by City voters, and if the City could not issue pension bonds by a date certain, Senate Bill 2190 required that the amortization of the legacy liability be recalculated to reflect the failure to deliver bond proceeds. Approval of the issuance of the pension bonds as part of the reforms in Senate Bill 2190 was granted by the City's voters in 2017.[288]

Assumed Rate of Return

Senate Bill 2190 also reduced the assumed rate of return on assets for all plans to 7 percent per annum. This conservative earnings assumption increased the legacy liability but provides for more realistic and achievable financial modeling moving forward.

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[287] *Id.*
[288] *Id.*

Risk Sharing

Senate Bill 2190 codifies a risk sharing and cost control mechanism. These risk sharing provisions were unique and part of the new governance concepts in this innovative piece of legislation. Specifically, the City and each pension system will share information and cooperate to evaluate the performance of the pension system. Each party is required to do an annual study called the actuarial risk sharing valuation study (RSVS). The initial RSVS process will set the City's projected future contribution rates for each pension system for the next 31 years. Furthermore, the projected contribution rates for each of those 31 years sets a contribution midpoint for the range of contributions that can be required from the City. The City bears the risk of pension costs increasing up to 5 percent above the contribution midpoint. If the increase is greater than 5 percent, then steps must be taken, including the reduction of benefits or increase of contributions, to reduce the City's cost. Conversely, if costs are 5 percent less than projected for any plan, steps must be taken to maintain the City's contribution at the minimum level. This risk sharing method is intended to limit the City and taxpayers' contribution each year to the pension systems. Moving forward, the calculation of the City's contribution rate for future fiscal years will be calculated by each subsequent year's RSVS.[289]

Since Passage of Senate Bill 2190

RSVS Process. Following the bill's passage, as prescribed by the legislation, confidentiality agreements were entered into between the three pension systems and the City's retained actuary, which allowed sharing of census data. Sharing of this data allowed the RSVS to be performed for the period beginning July 1, 2016 by the City's retained actuary. Independently, the actuaries retained by each of the three pension systems also completed their own studies. Those actuarial studies established not only the contribution rate for the City's fiscal year 2018, but also set the "corridor" midpoint that establishes the upper and lower bounds for the City's contribution rate for the next 30 years. The initial RSVS process was completed in 2017. For years one through 30, the corridor midpoint for HMEPS ranges from 8.17 percent in fiscal year 2018 to 8.81 percent in fiscal year 2047. Similarly, for HPOPS, the corridor midpoint ranges between 31.77 percent for fiscal year 2018 to 32.13 percent in fiscal year 2047, while the corridor midpoint for HFRRF is constant at 31.89 percent. The annual cost of amortizing the legacy liability for HMEPS is excluded from the calculation of the rate, and is instead paid on a fixed dollar schedule. Because the differences in calculations for HMEPS and HPOPS by the City and the pension systems for any year were less than two percent of projected payroll, the pension system's calculations were used to establish the corridor midpoints for future years. For HFRRF, the differences for each year were greater than two percent of projected payroll; therefore, the arithmetic means of the City and HFRRF calculations were used to establish the corridor midpoints.[290]

Reform's Effect on Net Pension Liability. Prior to reforms, the City estimated the Net Pension Liability (NPL) of the pension systems was approximately $8.1 billion. The City estimated that the reforms would reduce that liability by $2.9 billion without giving effect to the pension obligation

[289] *Id.*
[290] *Id.*

bonds. Based on the latest data as provided by the systems, the reforms had the effect of lowering the NPL to $5.1 billion, or approximately $3.2 billion lower.[291]

Budgeting to Fully-fund the Systems. The City's Fiscal Year 2018 budget provides for making the full actuarially required payments based on a 30-year closed amortization. For HMEPS that amount is $178.7 million; for HPOPS $143.2 million; and for HFRRF that amount is $83.6 million for a total of $405.5 million.[292]

Pension Obligation Bonds. In an election held on November 7, 2017, the City's voters overwhelmingly approved a referendum authorizing the City to issue pension obligation bonds as part of the reforms in Senate Bill 2190. The City then issued the bonds shortly thereafter and delivered bond proceeds in the amount of $250 million to HMEPS and proceeds in the amount of $750 million to HPOPS.[293]

Impact on Net Position. The City's Comprehensive Annual Financial Report for the period ending June 30, 2017 showed a major improvement in the City's net position—going from $95 million in the red to $1.855 billion in the black—a swing of $1.9 billion primarily due to pension reform.[294]

Rating Agencies. Credit rating agencies have taken notice of these historic reforms. In November 2017, Moody's raised the City's outlook to stable from negative (Aa3), and in January 2018, Standard & Poor's followed suit (AA).[295]

Implementation Concerns

As was the case during negotiations, HFRRF still maintains concerns over certain aspects of Senate Bill 2190. Specifically, HFRRF asserts that the City purposefully used a mortality table from 2000 for setting its contribution rate instead of a more recent mortality table that has been more recently used by HFRRF.[296] Moreover, HFRRF stressed in the April 4, 2018 hearing, that use of the mortality table from 2000 was an "accounting gimmick" employed by the City in an effort to lower the City's contribution rate. To fully comply with the provisions and legislative intent of Senate Bill 2190, current actuarial best practice standards must be employed by all parties throughout the implementation process. Senate Bill 2190 specifically provides that the Pension Review Board (PRB) be required to make a determination that the annual RSVS is in compliance with state law and must then report to the executive branch and legislature if any party is not in compliance with the law.

Recommendations

Without the reforms in Senate Bill 2190, the City was headed towards bankruptcy, meaning it could no longer meet its pension obligations, which would have been detrimental to all three pension systems. Although Senate Bill 2190 certainly protects the City's taxpayers and future City budgets, it also establishes clear funding policies requiring the full recommended contribution be made by the

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[291] *Id.*
[292] *Id.*
[293] *Id.*
[294] *Id.*
[295] *Houston (City of) TX*, MOODY'S, https://www.moodys.com/credit-ratings/Houston-City-of-TX-credit-rating-600026473 (last visited Aug. 9, 2018).
[296] *Monitoring Charge: Hearing Before the S. Comm. on State Affairs*, 2018 Leg., 85th Interim (Tex. 2018) (testimony of David L. Keller, Jr., Bd. Chair, Houston Firefighters' Relief and Ret. Fund).

City to all three plans each year. These required annual contributions to the pension systems will move each pension system towards long-term stability.

Although Senate Bill 2190 was certainly challenging for interested parties, the reforms made lead to a more secure future for the retirement plans and its members. The reforms represent meaningful progress towards establishing a fair and sustainable solution to the City's pension problems. Without the reforms in Senate Bill 2190, the City was headed towards a financial crisis while the pension systems faced serious funding shortfalls and rising pension costs that would have jeopardized their long-term sustainability.

Accordingly, the Legislature should continue to monitor the financial conditions of the public pension plans to ensure the long-term sustainability of those plans. Furthermore, the Pension Review Board must remain diligent monitoring the implementation of Senate Bill 2190 to ensure all parties continue to follow current actuarial best practice standards and are in full compliance with state law. As public pension systems from around the country continue to face challenges that threaten solvency and long-term sustainability, Texas must ensure its public retirees' benefits are safeguarded.

Implementation of House Bill 3158

Background

Prior to the 85th Legislature, the Dallas Police and Fire Pension System (DPFP) was in crisis and was expected to be insolvent by 2027. Shockingly, the pension fund was roughly 36 percent funded at the end of 2016. In 2016, DPFP took in more than $171 million in contributions from taxpayers, police, and firefighters but bled out $825 million in benefit payments and refunds. The bulk of the payments, $606 million, came from the Deferred Retirement Option Plan, known as DROP. DROP was a lucrative perk for veteran workers that functioned similar to a high-interest checking account for retirees. Even worse, DPFP had 70 percent of its assets in alternatives, including real estate, compared with an average of 22 percent that 160 other state and local pension plans had tied up in alternatives — and those investments produced very large losses.

Because of the magnitude of this financial emergency, it led to a deluge of retirements and transfers while simultaneously suppressing recruitment efforts. Even the City of Dallas' (City) credit ratings were downgraded because of the poor state of DPFP. The pension benefits of over 10,000 current and retired first responders were in absolute jeopardy, along with the City's economic stability. Because of the impending financial crisis, the City was obligated to work with DPFP and the Legislature to craft a reform plan that would stabilize the financial outlook of not only the City, but the pension system as well.

Discussion

In order to address this financial crisis, the 85th Legislature enacted House Bill 3158. House Bill 3158 solves a significant portion of the problem – fully funding the pension within 39 years according to the City's actuary, Deloitte Consulting LLP.[297] It also empowers a new board to make fiscally smart, responsible management decisions, and, within seven years, establishes a requirement to conduct an

[297] *Monitoring Charge: Hearing Before the S. Comm. on State Affairs*, 2018 Leg., 85th Interim (Tex. 2018) (testimony of Elizabeth M. Reich, Chief Fin. Officer, City of Dallas).

independent actuarial study to determine if additional changes are needed. Ensuring that the new leadership team upholds its fiduciary responsibilities to DPFP and its members was a priority. House Bill 3158 goes well beyond that though: it also reduced benefits, reformed DROP, and raised revenues.

New Governance Structure

The new governance structure of DPFP was one of the most important aspects of House Bill 3158. The new DPFP board consists of eleven members: six appointed by the Mayor and five by pension members. Ensuring these new board members serve as fiduciaries is absolutely vital to DPFP's long-term health; the pension system has had a tumultuous past, especially pertaining to board leadership and investment decisions. These new board members will serve as the conduits to fully implement House Bill 3158 and provide sound leadership for DPFP.

Once the board has the appropriate staff and consultants in place, rebalancing the fund's investment portfolio to ensure that the investment strategies are sustainable and profitable should be the first priority. Getting the investment portfolio that follows best practice standards will go a long way towards shoring up the fund's sustainability.

Contribution Rates

Prior to the reforms in House Bill 3158, it was clear that DPFP was not generating enough income to maintain solvency. Thus, House Bill 3158 raised revenues, in part through contribution rate increases. In total, over the next 35 years, the City will contribute an estimated $8.2 billion, or 72 percent of all contributions to DPFP.[298] For fiscal year 2018, the City will contribute about $151 million.[299] From 2018 to 2024, the City will contribute the greatest of 34.5 percent of computation pay or a set amount, known as the "floor," plus an additional $13 million per year.[300] These contributions are guaranteed, providing consistency and certainty to the pension system for seven years, while the effect of the reforms are evaluated, the investment portfolio is rebalanced, and the investment assumptions for actual experience are adjusted. Then, after year seven, the City will contribute 34.5 percent of actual computation pay.

Police and fire contributions also increased to stabilize the fund. Furthermore, DPFP employees agreed to an increased retirement age, a lower benefit multiplier, and other benefit changes. In fact, employees will contribute an estimated $3.1 billion to DPFP over the next 35 years.[301] Because of the contribution rate increases, along with other benefit adjustments, DPFP will start to stabilize and become more manageable moving forward. Even with the significant reforms in House Bill 3158, DPFP still offers a very competitive public pension benefit and is still comparable to other similar plans.

Benefit Reforms

- Reduces the benefit multiplier to 2.5 percent of salary for all future service. For those hired before March 1, 2011, this change means a cut from 3 percent. For those hired after March 1, 2011, this change is negligible.

- Increases the full retirement age to 58, from 50, for employees hired before March 1, 2011 and

[298] *Id.*
[299] *Id.*
[300] *Id.*
[301] *Id.*

from 55 for those hired after March 1, 2011.

- Links future cost-of-living adjustments (COLAs) to the plan achieving a funded ratio of 70 percent, with COLAs then subject to board approval.
- In terms of the DROP, House Bill 3158:
    - Limits the years in the DROP to 10; previously, the period was unlimited.
    - Changes the payment of DROP assets from a lump sum to an annuity.
    - Eliminates interest payment on assets in an active DROP, which previously guaranteed 6 percent and once as much as 10 percent. Moving forward interest will be paid at a Treasury-based rate on balances during the payment of the annuity.
- In terms of revenues, House Bill 3158:
    - Increases the employees' contribution rate to 13.5 percent from 8.5 percent for non-DROP participants and 4 percent for DROP participants.
    - Raises the City's contribution from 27.5 percent to 34.5 percent of payroll, plus $13 million a year until 2024 when an actuarial analysis will assess whether the plan will meet its funding target.[302]

Furthermore, as a result of House Bill 3158, current retirees will lose their COLAs until the plan's funded status improves substantially. Current workers will also receive lower benefits, face a much curtailed DROP program, and pay higher contributions. However, current and former members of DPFP were not the only ones making sacrifices to shore up the plan. The City and taxpayers will make higher employer contributions and pay an additional $13 million a year. Through these shared sacrifices and increased funding, DPFP will finally move in the right direction. Had these reforms not occurred, DPFP would have become insolvent and unable to payout benefits within years. That option was not acceptable to anyone.

Oversight and Actuarial Reviews

Given DPFP's tumultuous past, the pension system must have better oversight moving forward to prevent ill-advised decision making that may jeopardize the fund's security and members' benefits. Recently, the City issued a request for proposals for an actuarial services contract not only for the actuarial audit required by law every five years, but also for yearly actuarial reviews.[303] Annual actuarial audits can be an effective method to closely monitor the fund's health and investment decisions. These additional oversight efforts, along with the governance changes at the board level, should help ensure DPFP is moving towards long-term sustainability.

Furthermore, House Bill 3158 mandates a comprehensive review of the plan in 2024 by an independent actuary selected by the Pension Review Board, which will recommend additional changes, if necessary, to ensure the actuarial soundness of the plan. Independent audits are an effective tool, utilizing non-biased experts to review the status and operations of the pension fund. By 2024, when

[302] *Id.*
[303] *Id.*

the actuarial analysis will be conducted to ensure funding is sufficient to meet the guidelines set by the Pension Review Board, DPFP should be in far better shape. However, this is dependent on the City and pension fund strictly adhering to the provisions of House Bill 3158.

Credit Ratings

Prior to the passage of House Bill 3158, Moody's, S&P, and Fitch all downgraded the City's credit rating at least once and assigned negative outlooks. However, in September 2017, after reviewing House Bill 3158 and the City's actuarial analysis, Fitch revised the credit outlook to stable. Additionally, S&P did the same in October 2017, and Moody's followed in November 2017.[304] Improving the City's credit rating can have a tremendous impact on potential savings for the City and its taxpayers decades into the future.

Recommendations

Without the reforms in House Bill 3158, DPFP was expected to be insolvent by 2027. Although House Bill 3158 was certainly challenging for both the City and DPFP members, the reforms protect the City's taxpayers and future City budgets while also establishing clear funding and governance policies that benefit DPFP members. Although it will not happen overnight, these reforms will gradually move DPFP towards long-term stability and establish a pathway for a more secure future for DPFP and its members.

Accordingly, the Legislature should continue to monitor the financial conditions of the public pension system to ensure its long-term sustainability. Furthermore, the Pension Review Board must remain diligent monitoring the implementation of House Bill 3158 to ensure all parties continue to follow current actuarial best practice standards and are in full compliance with state law. As public pension systems from around the country continue to face challenges that threaten solvency and long-term sustainability, Texas must ensure its public retirees' benefits are safeguarded.

Implementation of House Bill 3976

Background

The Teacher Retirement System of Texas (TRS) was established in 1937. Article 16, Section 67, of the Texas Constitution charters TRS to provide retirement and related benefits for those employed by the public schools, colleges, and universities supported by the State of Texas. TRS is the largest public retirement system in Texas in both membership and assets.

TRS administers a defined benefit retirement plan that is a qualified pension trust under Section 401(a) of the Internal Revenue Code.[305] The pension trust fund provides service and disability retirement, as well as death and survivor benefits, to eligible Texas public education employees and their beneficiaries. Retirement benefits are financed by member and state contributions, employer contributions in some circumstances, and through investment earnings of the pension trust fund.

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[304] *Id.*
[305] 26 U.S.C. § 401.

In addition, TRS administers a separate trust that provides health benefit coverage for TRS retirees and eligible dependents. Created in 1985, TRS-Care is the health care program for retired members.[306] The program currently offers two optional plans and coverage for spouses and eligible dependents.[307] The Standard Plan is the health care plan for retirees under the age of 65 that are not eligible for Medicare.[308] The Medicare Advantage Plan is the health care plan for retirees that are eligible for Medicare.[309] Currently, for the non-Medicare eligible participants in the Standard Plan, Aetna administers the medical benefits, while CVS Caremark administers the pharmacy benefits. For the Medicare eligible participants in the Medicare Advantage Plan, Humana administers the medical benefits, while SilverScript administers the pharmacy benefits.[310]

TRS-Care is financed by investment income, a Medicare Part D drug subsidy, member premiums, and contributions by the state, school districts, and active public school employees.[311] Currently, the state contributes 1.25 percent of active employee payroll, while each school district contributes 0.75 percent, and active employees 0.65 percent.[312] Despite these funding sources, the program has experienced a shortfall the last several years. For the 2016-2017 biennium, TRS-Care experienced a $768 million shortfall. Furthermore, prior to the 85th Legislative Session, the program faced a $1.06 to $1.3 billion shortfall for the 2018-2019 biennium.[313] Even more alarming, had no reforms been made during the 85th Legislature, the shortfall for the following biennium was expected to range from $4 to $6 billion.[314] Prior to the 85th Legislature, the legislature made supplemental appropriations to cover previous shortfalls. Since 2005, the previous legislatures also chose to hold premiums and deductibles at the same 2005 levels keeping health care costs artificially low for all retirees and their families.[315] However, because the shortfall became so monumental, providing supplemental funding to keep TRS-Care solvent was no longer feasible or fiscally responsible.

Discussion

Prior to the reforms made by the 85th Legislature, the structure for TRS-Care was not sustainable. Because funding is based on percentages of active employee payroll and not the true cost of retiree health care, the plan has faced financial shortfalls each biennium in recent history. Approximately 20,000 new retirees are added to the plan each year.[316] Additionally, all retirees and their dependents that are not enrolled in Medicare, including members who retire before the age of 65, and are not eligible for Medicare, are draining the plan's fund because this group costs over four times more than the cost of Medicare eligible participants.[317] Because non-Medicare eligible participants are depleting the TRS-Care fund at a rapidly increasing rate, changes to that group's coverage were absolutely necessary in order to keep the plan sustainable for all retirees.

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[306] *Monitoring Charge: Hearing Before the S. Comm. on State Affairs*, 2018 Leg., 85th Interim (Tex. 2018) (testimony of Brian Guthrie, Teachers' Ret. Sys.).
[307] *Id.*
[308] *Id.*
[309] *Id.*
[310] *Id.*
[311] *Id.*
[312] *Monitoring Charge: Hearing Before the S. Comm. on State Affairs*, 2018 Leg., 85th Interim (Tex. 2018) (written testimony of Brian Guthrie, Teachers' Ret. Sys.).
[313] *Id.*
[314] *See supra* note 196.
[315] *Id.*
[316] *Id.*
[317] *Id.*

There were no simple answers to addressing the health care funding shortage for TRS-Care during the 85th Legislature. However, it was clear that drastic funding and benefit changes needed to occur to ensure the TRS-Care plan is sustainable long-term. If drastic measures were not taken during the 85th Legislative Session, the TRS Board of Trustees would have had limited flexibility in providing a new plan design to continue any type of health care plan. In fact, the TRS Board of Trustees would have been forced to increase retiree premiums to account for the projected $1.06 to $1.3 billion shortfall. Had the 85th Legislature not provided any additional funding and made no legislative changes, the estimated shortfall would have been fully borne by the retirees. Thus, the TRS Board of Trustees would likely have been obligated to close the TRS-Care plan and begin to phase out current participants. Because retirees are on fixed incomes and greatly depend on their health care benefits, the 85th Legislature was left with no alternative except to embrace the reforms proposed in House Bill 3976 and contribute additional state funding to ensure that TRS-Care remained sustainable. Realizing these stark realities, the 85th Legislature unanimously approved the reforms with support from the Texas Retired Teachers Association, the largest retiree advocate group.

In order to keep the TRS-Care program alive, the 85th Legislature passed Senate Bill 1 and House Bill 3976 to provide additional funding and statutory changes to sustain the program. Senate Bill 1 provided for additional, permanent state and district contributions illustrating commitment to the program. In fiscal years 2018-2019, Senate Bill 1:

- Increased the state contribution from 1 percent to 1.25 percent of active employee payroll;
- Provided $182.6 million in a one-time supplemental contribution; and
- Increased the district contribution from 0.55 percent to 0.75 percent of active employee payroll.

In totality for the 2018-2019 biennium, Senate Bill 1 provided for an additional $483.9 million to TRS-Care. In regards to the policy reforms, House Bill 3976 provided for statutory changes:

- Increased the state contribution from 1 percent to 1.25 percent of active employee payroll, which is a permanent and on-going increase in state funding to the program;
- Established the Standard Plan for non-Medicare eligible participants (pre-65);
    - High Deductible Plan that qualifies for a Health Savings Account
    - $0 cost for certain generic prescription maintenance drugs
    - $0 premium for disability retirees who retired as a disability retiree on or before January 1, 2017 and are not eligible to enroll in Medicare
- Established the Medicare Advantage Plan for Medicare eligible participants;
    - Maintain the current Medicare Advantage 2 plan design
    - Maintain Medicare Part D Plan for prescription drug benefits
- Eliminated the statutory requirement to provide a $0 premium health care plan; and
- Provided an open enrollment opportunity for retirees aging into Medicare to enroll in the TRS-Care Medicare plan even if they did not participate in TRS-Care's non-Medicare plan.

Furthermore, during the First Called Session of the 85th Legislature, the Governor added TRS-Care to the "call" to allow legislation to increase the average salary and benefits (including TRS-Care) of

Texas teachers; and legislation to provide a more flexible and rewarding salary and benefit system for Texas teachers. A number of bills were filed during the special session but ultimately supplemental funding for TRS-Care was added to House Bill 21 and House Bill 30.[318] As a result, an additional supplemental appropriation of $212 million was contributed to TRS-Care during the special session.[319] The supplemental funding provided that TRS decrease premiums and deductibles for plan participants, and reduce costs for an enrolled adult child with a mental disability or a physical incapacity for the 2018 and 2019 plan years. TRS then determined the most efficient allocation to achieve the maximum benefit for participants in TRS-Care.

The statutory changes in House Bill 3976 took effect January 1, 2018. Beginning January 1, 2018, TRS-Care established a Standard Plan for non-Medicare eligible participants and a Medicare Advantage Plan for Medicare eligible participants. Previous plan options (TRS-Care 1/2/3 & Medicare Advantage 2/3) are no longer offered. Overall, the state contributed approximately a total $1.3 billion to TRS-Care for the 2018-2019 biennium.[320] Moreover, the state's increased contribution from 1 percent to 1.25 percent and the districts' increased contribution from 0.55 percent to 0.75 percent provides new ongoing funding to TRS-Care. These permanent funding increases will allocate hundreds of millions of extra dollars to the program annually.

However, even after these reforms and additional funding sources, TRS-Care will still face $400-$600 million shortfall for the 2020-2021 biennium.[321] As long as funding continues to be based on percentages of active employee payroll instead of the true cost of retiree health care, funding shortfalls will persist. Even the reforms in House Bill 3976 that completely overhauled the previous structure of TRS-Care were not enough to keep the plan solvent in the long-term.

Since the reforms took effect, the Legislature has certainly learned more about the impact that the reforms have had upon many, if not most, retired public education employees and their families. For example, many retirees decided to leave TRS-Care altogether and obtain health insurance coverage through other means. As of the April 4, 2018 committee hearing, 36,400 participants had chosen to leave the program.[322] However, 10,040 of the participants that left were only enrolled in the no-cost high deductible plan, previously called TRS-Care 1.[323] Because the no-cost plan was eliminated, most of those retirees were not interested in paying a premium because enrollment in TRS-Care 1 merely served as secondary coverage. Even with the large number of participants choosing to leave TRS-Care, the program still has approximately 235,735 participants.[324] Thus, TRS-Care still serves an overwhelming number of retired public education employees and their families.

Affordability concerns as a result of the reforms in House Bill 3976 appear to be the top concern among retirees.[325] Since 2005, the legislature has directed TRS to freeze premiums and plan design costs to retirees.[326] Because of this, contributions to the program have remained the same while health care costs have dramatically risen. This, in part, has played a role in the funding woes of TRS-Care. Premiums, deductibles, and other costs increased as a part of the reforms in House Bill 3976 in order

[318] Tex. H.B. 21, 85th Leg., C.S., (2017).
[319] *See supra* note 196.
[320] *Id.*
[321] *See supra* note 202.
[322] *Id.*
[323] *Id.*
[324] *See supra* note 196.
[325] *Monitoring Charge: Hearing Before the S. Comm. on State Affairs*, 2018 Leg., 85th Interim (Tex. 2018) (testimony of Timothy Lee, Tex. Ret. Teachers Assoc.).
[326] *See supra* note 196.

to catch up to current levels. Although the 85th Legislature would have preferred to keep premiums and other costs at the 2005 level, it was no longer feasible. Now, the premium for retiree-only coverage in the Standard Plan and for those that are not eligible for Medicare is currently set at $200 per month.[327] For retiree and spousal coverage, it is $689 per month.[328] Retiree-only coverage for those that are Medicare eligible in the Medicare Advantage Plan is currently $135 per month.[329] For retiree and spousal coverage, it is $529 per month.[330]

The difference in premium costs from before and after the reforms in House Bill 3976 vary greatly. Surprisingly, for a small number of retirees, premiums actually decreased. However, for the majority, premiums increased, especially for those retirees covering spouses or dependents. The reforms in House Bill 3976 prioritized retirees themselves which resulted in premiums for spousal and dependent coverage to increase at a greater rate. At the committee's April 4, 2018 hearing, the committee learned that many families deemed spousal and dependent coverage unaffordable.[331] Although the premiums for spousal or dependent coverage did dramatically increase, the current rates still fare better than most comparable plans on the open market. While there may be alternative plans on the open market that have less expensive premiums, the actual benefits may not be comparable to those in TRS-Care.

Unfortunately, the 85th Legislature was also forced to eliminate the multitude of options TRS-Care previously offered to contain future costs. Continuing to offer a full menu of coverage options was no longer practicable given the current funding structure. Facing a $1.06 to $1.3 billion shortfall, the 85th Legislature had limited options moving forward to address the funding problems. One option that resulted in significant savings to the program was to eliminate all coverage options except a Standard Plan for those under the age of 65 and a Medicare Advantage Plan for the Medicare eligible participants. Although this resulted in significant coverage changes for most retirees under the age of 65, it did not cause too much modification for those eligible for Medicare, which consists of the majority of retirees participating in TRS-Care. Across the country, public and private employers have been using the same strategy of limiting the selection of coverage options in hopes that it is the least disruptive cost-savings measure for members and their families.

Finally, the dramatic increase in the deductible for the non-Medicare eligible participants in the Standard Plan has been especially difficult for many retirees.[332] Prior to the reforms in House Bill 3976, deductibles for participants that are not Medicare eligible ranged from $150 to $5,250, depending on the plan. The majority of participants were enrolled in TRS-Care 2 and TRS-Care 3, which had deductibles of $1,300 and $400, respectively.[333] Starting January 1, 2018 when the provisions of House Bill 3976 took effect, participants of the Standard Plan now have a $1,500 deductible for individual coverage, or $3,000 for family coverage.[334] The maximum out-of-pocket also rose to $5,650 for individual and $11,300 for family coverage.[335] Previously, the maximum out-of-pocket ranged from $3,150 to $8,250, depending on the plan.[336] Under the Standard Plan, for retirees under the age of 65, participants must pay all medical costs until the deductible is met. Many retirees have expressed concerns over being able to afford all medical costs prior to reaching the

[327] *See supra* note 202.
[328] *Id.*
[329] *Id.*
[330] *Id.*
[331] *See supra* note 215.
[332] *Id.*
[333] *See supra* note 202.
[334] *Id.*
[335] *Id.*
[336] *Id.*

deductible. However, once the deductible is met, TRS-Care then covers 80 percent of all in-network medical costs, including prescription drug costs. Furthermore, should medical costs reach the maximum out-of-pocket, the plan would then cover 100 percent of all in-network costs for the remainder of the plan year.[337] While meeting the deductible may be financially difficult for retirees and their families, TRS-Care certainly provides worthy benefits once the deductible is actually met. For the majority of retirees, those that are Medicare eligible, the deductible is only $500; and therefore, do not face the same financial burden that retirees under the age of 65 experience.

Recommendations

Since the reforms took effect January 1, 2018, retirees' stories have resonated with members of the Legislature. The Legislature understands that TRS retirees are on fixed incomes and most, if not all, do not receive social security. However, it was clear that allowing the plan to fall into a "death spiral" was not acceptable. Given limited options and resources, the 85th Legislature made difficult choices to ensure the program was maintainable so that all retirees would not lose their health insurance benefits. The 85th Legislature also demonstrated its commitment to the program by permanently increasing the State's and districts' funding, and continuing to provide additional appropriations in the form of supplemental funding. Without the additional funding the State has provided over the past few biennia, TRS-Care would have been forced to shut down.

As the impact of House Bill 3976 continues to be analyzed, addressing the chronic funding problems of TRS-Care will continue to be a priority of the Legislature. Maintaining a plan that is sustainable and affordable continues to be the priority. Accordingly, the Legislature should continue to monitor the financial conditions of TRS-Care, and when necessary, take actions to ensure the plan is affordable for retirees, and sustainable to guarantee retirees' access to health care coverage.

Implementation of Senate Bill 16

The committee took no action relating to this charge.

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[337] *Id.*

Appendix

Written testimony from the committee's interim hearings is available upon request.