IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

ESI/EMPLOYEE SOLUTIONS, LP; HAGAN LAW GROUP LLC; and STATE OF TEXAS, ***Plaintiffs,*** v. CITY OF DALLAS; T.C. BROADNAX, in his official capacity as City Manager of the City of Dallas; and BEVERLY DAVIS, in her official capacity as Director of the City of Dallas Office of Equity and Human Rights, ***Defendants.***	§ § § § § § § § § § § § § § § §	NO. 4:19-CV-00570-SDJ

PLAINTIFFS' JOINT MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT

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TO THE HONORABLE SEAN D. JORDAN:

Plaintiffs ESI/Employee Solutions, LP ("ESI"), Hagan Law Group LLC ("Hagan") (collectively, the "Employer Plaintiffs"), and the State of Texas (collectively, with the Employer Plaintiffs, "Plaintiffs") file their Motion for Summary Judgment. Plaintiffs seek summary judgment because no genuine issue of material fact exists, and Plaintiffs are entitled to judgment as a matter of law as to Employer Plaintiffs' Fourth Amendment claim and all Plaintiffs' preemption claim.

STATEMENT OF ISSUES

1. Are the Employer Plaintiffs entitled to summary judgment on their Fourth Amendment claim when there are no disputed facts and Employer Plaintiffs are entitled to judgment as a matter of law that the Ordinance violates Employer Plaintiffs' right to be free of unreasonable searches and seizures arising under the United States Constitution?
2. Are Plaintiffs entitled to summary judgment on their preemption claim when there are no disputed facts and Plaintiffs are entitled to judgment as a matter of law that the Ordinance is preempted by the Texas Minimum Wage Act?

INTRODUCTION

Employer Plaintiffs are small businesses in Collin County who are injured by the unconstitutional regulatory power imposed by the City of Dallas (the "City") through its ordinance mandating that private employers provide paid sick leave to their employees (the "Ordinance"). Employer Plaintiffs are located in Collin County, not the City. But, because Employer Plaintiffs have employees who spend 80 hours

or more per year inside the City (not uncommon given the interconnectedness of the DFW metroplex), the City imposes its regulatory mandate onto Employer Plaintiffs in Collin County by the requirement that they comply with the Dallas Ordinance.

The Ordinance

On April 24, 2019, the City enacted the Ordinance mandating that private employers provide paid sick leave to their employees. Dall. City Code § 20-1—20-12. The Ordinance covers all employees who "perform[] at least 80 hours of work for pay within the City of Dallas, Texas in a year for an employer, including work performed through the services of a temporary or employment agency." Dall. City Code at § 20-2(5).

The Ordinance requires employers to "grant an employee one hour of earned paid sick time for every 30 hours worked for the employer in the City of Dallas." This accrual begins at the commencement of employment or either August 1, 2019, for an employer with more than five employees, or August 1, 2021, for an employer with not more than five employees at any time in the preceding 12 months, whichever is later." Dall. City Code at § 20-4(a-b).

The Ordinance requires "[t]he employer [to] provide earned paid sick time in an amount equal to what the employee would have earned if the employee had worked the scheduled work time, exclusive of any overtime premium, tips, or commissions, but no less than the state minimum wage." Dall. City Code at § 20-5(a).

The Ordinance requires that "[o]n no less than a monthly basis, an employer shall provide electronically or in writing to each employee a statement showing the

amount of the employee's available earned paid sick time," Dall. City Code at § 20-7(a) (requiring employers to track hours worked even for employees paid on a salary basis and exempt from FLSA rules).

The Ordinance requires employers to allow an

> Employee [to] request earned paid sick time . . . for an absence from the employee's scheduled work time caused by:
>
> (1) The employee's physical or mental illness, physical injury, preventative medical or health care, or health condition; or
>
> (2) The employee's need to care for their family member's physical or mental illness, physical injury, preventative medical or health care, or health condition; or
>
> (3) The employee's or their family member's need to seek medical attention, seek relocation, obtain services of a victim's services organization, or participate in legal or court ordered action related to an incident of victimization from domestic abuse, sexual assault, or stalking involving the employee or the employee's family member.

Dall. City Code at § 20-5(c).

The Ordinance requires employers with more than 15 employees at any time within the last 12 months (deemed "medium or large employers") to provide their employees up to a maximum of 64 hours of paid sick leave a year and requires covered employers with 15 or fewer employees at any time within the last 12 months (deemed "small employers") to provide their employees up to a maximum of 48 hours of paid sick leave per year. Dall. City Code at § 20-2(8, 11); *id*. at § 20-4(c).

The Ordinance requires employers to "display a sign describing the requirements of this chapter . . .," Dall. City Code at § 20-7(e), and requires "[a]n employer who provides an employee handbook to its employees must include a notice

of [the paid sick leave obligations in the ordinance] in that handbook." *Id.* at § 20-7(b).

The Ordinance provides that "[n]either the amount of available earned paid sick time nor the right to use earned paid sick time shall be affected by an employee's transfer to a different facility, location, division, or job position with the same employer." Dall. City Code at § 20-5(i). The City by this provision requires employers who have employees within the City to apply the mandates of the Ordinance even when those employees are later working outside the jurisdiction of the City.

The Ordinance empowers "[t]he director of the department implementing the ordinance] [to] issue subpoenas to compel the attendance of a witness or the production of materials or documents in order to obtain relevant information and testimony." Dall. City Code at § 20-10(b).

Employers who violate the requirements of the Ordinance face "a civil fine not to exceed $500" and "[e]ach violation of a particular section or subsection of this chapter constitutes a separate offense." Dall. City Code at § 20-11(a).

The Ordinance provides for penalties if a person "refus[es] to appear or to produce any document or other evidence after receiving a subpoena pursuant to this section." Dall. City Code at § 20-10(b).

The Claims

The Ordinance violates Employer Plaintiffs' right to be free of unreasonable searches and seizures rights arising under the United States Constitution. Moreover, because the Ordinance conflicts with Texas statutory law, it is preempted and

therefore in violation of the Texas Constitution. The Texas Minimum Wage Act prohibits municipalities, such as the City, from regulating the wages of employees of private businesses, incorporating the wage rates of the Federal Fair Labor Standards Act (the "FLSA") into state law, but further preempting any municipal ordinances from going beyond those standards. Plaintiffs seek a declaratory judgment that the Ordinance is unlawful on its face, and a permanent injunction against its enforcement. The State of Texas, injured in its sovereign capacity due to the City's flouting of the Texas Minimum Wage Act, also seeks this relief as to that claim.

On March 30, 2020, this Court issued a Memorandum Opinion & Order granting in part and denying in part the City's motion to dismiss and granting Plaintiffs' motion for preliminary injunction (the "Memorandum Opinion"). (Dkt. #64). The Memorandum Opinion analyzed the purely legal issues for the facial claims in this case, and that analysis is applicable to support Plaintiffs' summary judgment motion.

The Employer Plaintiffs are entitled to summary judgment on their Fourth Amendment claim, and all Plaintiffs are entitled to summary judgment on their preemption claim.[1] There are no material facts in dispute and Plaintiffs are entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a).

STATEMENT OF UNDISPUTED MATERIAL FACTS

ESI is a for-profit corporation incorporated in the State of Texas and headquartered in the City of Plano in Collin County. (Dkt. #3-1, Bristol Declaration

[1] The State of Texas joins this Motion in relation to its own claim that the Ordinance is preempted by the Texas Minimum Wage Act.

at ¶3). It provides temporary staffing in various industries, employing over 300 temporary employees within the City of Dallas at any given time, and will be injured by the provisions of the Ordinance. (Dkt. #3-1, Bristol Declaration at ¶¶3-4). ESI maintains business records that are proprietary and confidential which it would not want to disclose to the City of Dallas. (Dkt. #3-1, Bristol Declaration at ¶6). Like most staffing companies, ESI provides workers with a gateway to employment. The very nature of ESI's business is temporary work – the service that ESI's clients contract for and the type of work that ESI's employees choose to obtain. ESI exists to fill gaps in the workforce needs of other businesses, and it is contrary to this business model to require ESI to provide paid leave to workers whose jobs are to fill in for vacant positions. (Dkt. #3-1, Bristol Declaration at ¶8).

Hagan is a for-profit corporation incorporated in the State of Texas and based in the City of Allen in Collin County. It provides legal counseling and representation to employers and executives in various industries located in Texas. Hagan currently employs one attorney who works full-time remotely from home within the City of Dallas. Hagan and its Dallas-based attorney have negotiated terms and conditions of employment that provide the employee a more flexible schedule and mutually agreed compensation in exchange for not having other benefits like paid leave. (Dkt. #3-2, Hagan Declaration at ¶¶3-4, 6).

Furthermore, as a labor and employment law firm, Hagan employees appear in court and engage in other client related matters within the City of Dallas on average for more than 80 hours total per year and will be injured by the provisions of

the Ordinance. (Dkt. #3-2, Hagan Declaration at ¶7). Hagan maintains business records that are proprietary and confidential which it would not want to disclose to the City of Dallas. (Dkt. #3-2, Hagan Declaration at ¶5).

STANDARD OF REVIEW

"Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1). Summary judgment under Rule 56(c) is appropriate when there is no genuine issue as to any material fact in the case and the moving party is entitled to judgment as a matter of law. *Id.* at 322.

"If the movant bears the burden of proof on a claim or defense for which it is moving for summary judgment, it must come forward with evidence that establishes 'beyond peradventure *all* of the essential elements of the claim or defense.'" *Meier v. UHS of Del., Inc.*, 4:18-cv-00615, 2020 U.S. Dist. LEXIS 23057, at *11 (E.D. Tex. Feb. 11, 2020) (Mazzant, J.) (quoting *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986)).

The party moving for summary judgment bears the initial burden of identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Id.* at 323. "If the moving party meets the initial burden of showing there is no genuine issue of material fact, the burden

shifts to the nonmoving party to produce evidence or designate specific facts showing the existence of a genuine issue for trial." *Allen v. Rapides Parish Sch. Bd.*, 204 F.3d 619, 621 (5th Cir. 2000) (quoting *Engstrom v. First Nat'l Bank*, 47 F.3d 1459, 1462 (5th Cir. 1995)). "The failure of the nonmovant to establish a genuine issue of material fact as to every essential element of [his] claim mandates entry of summary judgment against [him] as to that claim." *Bookman v. Shubzda*, 945 F.Supp. 999, 1004 (N.D. Tex. 1996) (Fitzwater, J.) (citing *Dunn v. State Farm Fire & Casualty Co.*, 927 F.2d 869, 872 (5th Cir. 1991)).

This Motion is being filed prior to discovery in this case. However, as this Court stated in its recent Memorandum Opinion, "[t]his case involves a facial challenge to the constitutionality of the Ordinance [and] the parties agree that the subject matter [of this case] lends itself to having little evidence to present," as "[t]he questions before the Court in this case are predominantly legal in nature. . . . and the parties have likewise "point[ed] to no physical evidence that may be required to resolve the case." (Dkt. #64 at 42-43). "Whether the Ordinance is preempted by the Texas Constitution is not a claim that is dependent on the resolution of multiple questions of Texas law. It requires the Court to decide only whether the Texas legislature intended to preempt municipalities from regulating the minimum wage and, if so, whether the paid sick leave mandated by the Ordinance falls within the meaning of the word 'wage.'" (Dkt. #64 at 43).

It is not unusual for summary judgment to be granted before discovery in cases involving purely legal questions. *See Landry v. Air Line Pilots Ass'n Int'l AFL-CIO*,

892 F.2d 1238, 1269 (5th Cir. 1990) (affirming summary judgment granted prior to discovery because "many of the issues raised by the summary judgment motions were purely legal and . . . discovery would therefore not aid their resolution."); *Rosas v. U.S. Small Bus. Admin.*, 964 F.2d 351, 359 (5th Cir. 1992) ("As the issues to be decided by the district court were purely legal in nature, the court did not abuse its discretion in deciding the summary judgment motion prior to completion of discovery.").

ARGUMENT AND AUTHORITIES

I. Plaintiffs have Standing to Challenge the Ordinance.

In an action like this one, the standing requirement can be met by establishing "actual present harm or a significant possibility of future harm," *Bauer v. Texas*, 341 F.3d 352, 357–58 (5th Cir. 2003) (quoting *Peoples Rights Org. v. City of Columbus,* 152 F.3d 522, 527 (6th Cir. 1998)), "even though the injury-in-fact has not yet been completed," *id.* (quoting *Nat'l Rifle Ass'n of Am. v. Magaw,* 132 F.3d 272, 280 (6th Cir. 1997)).

At the summary judgment stage, plaintiffs "must 'set forth' by affidavit or other evidence 'specific facts'" to establish their standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (quoting Fed. R. Civ. P. 56(e)). "[O]ne party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Texas v. United States*, 809 F.3d 134, 151 (5th Cir. 2015).

To establish Article III standing, "a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not

conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180-81 (2000).

A. The Employer Plaintiffs Have Standing.

If a plaintiff can establish that it is an "object" of the law at issue, "there is ordinarily little question that the action or inaction has caused [the plaintiff] injury, and that a judgment preventing or requiring the action will redress it." *Lujan*, 504 U.S. at 561-62; *see also Duarte v. City of Lewisville*, 759 F.3d 514, 518 (5th Cir. 2014) ("It follows from *Lujan* that if a plaintiff is an object of a government regulation, then that plaintiff ordinarily has standing to challenge that regulation.").

When a plaintiff suffers "a direct pecuniary injury" that is generally "sufficient to establish injury-in-fact." *K.P. v. LeBlanc*, 627 F.3d 115, 122 (5th Cir. 2010); *see also Texas v. United States*, 945 F.3d 355, 380 (5th Cir. 2019) ("Economic injury of this sort is a quintessential injury upon which to base standing.") (cleaned up).

Where a plaintiff challenges government action, "[c]ausation and redressability typically overlap as two sides of a causation coin." *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 6 n.1 (D.C. Cir. 2017) (cleaned up). "After all, if a government action causes an injury, enjoining the action usually will redress that injury." *Id.* That is true here.

Under the Ordinance, Employer Plaintiffs would be required to expend resources, including staff time, to comply with the Ordinance's mandates when it

becomes effective, such as hiring additional staff or purchasing software to track compliance. (Dkt. #3-1, Bristol Declaration; Dkt. #3-2, Hagan Declaration).

For example, the Ordinance would require Employer Plaintiffs to expend resources, including staff time, to determine how and to prepare to comply with the Ordinance requirements that they:

a. Track carry-over accrued sick leave time from year to year. Dall. City Code at § 20-4(d);

b. Provide monthly statements to employees showing the amount of available earned sick time. Dall. City Code at § 20-7(a);

c. Amend their employee handbooks to "include a notice of employee rights and remedies under" the Ordinance. Dall. City Code at § 20-7(b);

d. Create and display signage describing the requirements of the Ordinance. Dall. City Code at § 20-7(e).

This increased regulatory burden is sufficient for Article III standing. *See Contender Farms, L.L.P. v. U.S. Dep't of Agric*., 779 F.3d 258, 266 (5th Cir. 2015) ("An increased regulatory burden typically satisfies the injury in fact requirement.") (citation omitted). This includes the disruption of scheduling changes, *see Chavez v. City of Albuquerque*, 630 F.3d 1300, 1309 (10th Cir. 2011) ("A sick day is usually unscheduled or unexpected, and is a burden because the employer must find last-minute coverage for the sick employee."), and the tracking of every hour an employee works within City limits as opposed to another jurisdiction.

Under current law, if an employee who normally works 40 hours a week took one 8-hour day off sick, Employer Plaintiffs would only be required to pay the employee at least the minimum wage for the hours actually worked: 32. After the Ordinance goes into effect, under the same scenario, Employer Plaintiffs would be required to pay at least the minimum wage for forty hours. This means that the Ordinance increases wages for the work week beyond that required by the Texas Minimum Wage Act, as the Court explained in its Memorandum Opinion. (Dkt. #64 at 52-55).

If the Ordinance goes into effect, Plaintiff ESI will have unique and particularized injury due to the itinerant and mobile nature of its workforce and the burdens imposed by the Ordinance. Keeping track of how many hours of the day each employee is working within the City, as opposed to nearby cities, will be an enormously costly undertaking for which ESI does not currently have budgeted resources to implement. (Dkt. #3-1, Bristol Declaration at ¶7).

Also, ESI will have to pay double the labor cost when employees use the benefits mandated by the Ordinance because of the nature of its business. For example, consider a scenario where a business has an employee out sick, and asks a staffing company to provide a temporary one. If the staffing company calls an employee to see if he is available to work the position for 8 hours that day, and the employee responds that he is ill and will now take his paid sick leave, the staffing company will have to pay him for 8 hours and also pay another employee for 8 hours to work the vacant position. (Dkt. #3-1, Bristol Declaration at ¶9).

ESI has over 300 employees in the City, who make an average of $12.85 an hour. Based on the requirements of the Ordinance, ESI estimates that leave paid out will be approximately $269,000.00 annually if each of its Dallas employees take the full amount of paid leave mandated by the Ordinance. (Dkt. #3-1, Bristol Declaration at ¶10).

ESI will also need to hire an additional employee to track where employees are placed, track their hours, calculate leave earned, and send the monthly reports required by the Ordinance. This new employee position will cost ESI around $60,000.00 annually just to manage the administrative requirements of the Ordinance. (Dkt. #3-1, Bristol Declaration at ¶11).

ESI will also need to change its training manuals, handbooks, and orientation materials, and estimates that its software company will charge $500.00 to make changes to its application and documents. ESI also estimates that it will also need to provide approximately $3,000.00 in labor to make changes to relevant policies, and that it would have to spend approximately $1,500.00 in staff training time and travel to training. (Dkt. #3-1, Bristol Declaration at ¶12).

The additional expense required of the mandates of the Ordinance would require ESI to rearrange the mix of pay and benefits for its employees. It could have to raise rates for clients, which would likely result in lower wages they would be willing to pay their temporary employees placed by ESI. Additionally, ESI currently provides paid holiday leave for its employees; because that is not legally required, the increased costs of a mandate to provide paid sick leave would likely require it to

eliminate paid holiday leave. (Dkt. #3-1, Bristol Declaration at ¶13).

In response to the Ordinance, Plaintiff Hagan will be required to use a different and more complex time reporting/tracking software than what it uses now. It has estimated that legal reporting/billing software allowing the tracking of work locations and absences, with whole day or partial days, will cost an additional $3,000.00 annually. The hours to train support staff and the attorneys on a new system will cost approximately $2,800.00. (Dkt. #3-2, Hagan Declaration at ¶9).

The issuance of monthly statements required by the Ordinance would cost Hagan approximately $600.00 annually. (Dkt. #3-2, Hagan Declaration at ¶10).

Hagan estimates the total cost of modifying its operations to ensure compliance with the Ordinance would be $6,400.00 for the first year and $4,000.00 for each year thereafter. In addition, the cost of the payout for sick leave (and for substitute wages for of counsel needed when an employee takes leave) would amount to a minimum of $14,000.00 per year (plus payroll taxes) for one employee working in the City. (Dkt. #3-2, Hagan Declaration at ¶11).

The additional expense required of the mandates of the Ordinance would require Hagan to rearrange the mix of pay and benefits for its employees. It could delay planned wage increases or bonuses for other staff. It could have to raise rates for clients or reduce overall employee compensation. It is also possible that Hagan would be forced to cancel its $5,500.00 per year Westlaw subscription, cancel plans to replace antiquated computer equipment, and eliminate year-end bonuses. (Dkt. #3-2, Hagan Declaration at ¶12).

B. The State of Texas Has Standing.

The State has a "sovereign interest[]" in "the exercise of sovereign power over individuals and entities within [its] jurisdiction." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982). That interest includes "the power to create and enforce a legal code, both civil and criminal." *Id.*

A violation of the State's legal code, including the provisions of the Texas Minimum Wage Act limiting municipal power, is an Article III injury in fact to the State. It harms "Texas's concrete interest, as a sovereign state, in maintaining compliance with its laws." *Texas v. EEOC*, 933 F.3d 433, 447 (5th Cir. 2019); *see also Abbott v. Perez*, 138 S.Ct. 2305, 2324 n. 17 (2018) (explaining that a State's "inability to enforce its duly enacted [laws] clearly inflicts irreparable harm"). The Fifth Circuit has held that an injunction purportedly allowing local officials to act "in violation of state law" creates an Article III injury in fact because "[t]he State has a sovereign interest in enforcing its laws." *Castillo v. Cameron Cty.*, 238 F.3d 339, 350–51 (5th Cir. 2001); *see also id.* at 349 n.16.

The same is true for the Ordinance: it violates State law, and it authorizes local officials to violate State law. That is enough to give Texas standing. "That the State has a justiciable 'interest' in its sovereign capacity in the maintenance and operation of its municipal corporations in accordance with law does not admit of serious doubt." *Yett v. Cook*, 281 S.W. 837, 842 (Tex. 1926). But even if there were doubt about standing here, it would be resolved in favor of the State. "[T]he Supreme Court has long recognized States' special rights to seek relief in federal court." *In re Gee*, 941

F.3d 153, 167 (5th Cir. 2019); *see also Massachusetts v. EPA*, 549 U.S. 497, 520 (2007) (giving a State "special solicitude in [the] standing analysis").

II. Plaintiffs Are Entitled to Judgment that the Ordinance Is Unlawful.

The Declaratory Judgment Act is remedial, and a party seeking declaratory relief must have an underlying cause of action. *Collin Cty., Texas v. Homeowners Ass'n for Values Essential to Neighborhoods*, 915 F.2d 167, 170 (5th Cir. 1990). "Under the federal Declaratory Judgment Act, the Court 'may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.'" *Duarte v. City of Lewisville*, 136 F.Supp.3d 752, 790 (E.D. Tex. 2015) (quoting 28 U.S.C. § 2201).

In its Memorandum Opinion, this Court held that the Ordinance is likely preempted by the Texas Minimum Wage Act. (Dkt. #64 at 47-55). Although this finding made it unnecessary for the Court to address the likelihood of success on Employer Plaintiffs' Fourth Amendment claim, the legal determinations in the portion of the Memorandum Opinion overruling the City's attempt to dismiss that claim also necessarily lead to summary judgment on that ground. (Dkt. #64 at 30-38).

A. On Its Face, the Ordinance Violates the Search and Seizure Clause of the Fourth and Fourteenth Amendments.

As the Court reasoned in its Memorandum Opinion, the Ordinance's subpoena provision does not provide for the constitutionally required pre-compliance procedure in a neutral forum. (Dkt. #64 at 30-38). This purely legal determination is no different at the summary judgment stage. Nothing about the relevant precedent has changed

since this Court issued its Memorandum Opinion. Thus, rather than burden the Court with duplicative briefing, the Employer Plaintiffs incorporate by reference the briefing the Court already considered (Dkt. #3 at 12-13; #24 at 4-6; #48 at 23-27) and respectfully request that the Court apply its earlier analysis to summary judgment.

The Ordinance empowers "[t]he director of the department implementing the ordinance] [to] issue subpoenas to compel the attendance of a witness or the production of materials or documents in order to obtain relevant information and testimony." Dall. City Code at § 20-10(b). The Ordinance does not provide employers subject to it the ability to seek pre-compliance administrative review of the subpoena. (Dkt. #64 at 30-38).

Administrative subpoenas are "constructive" searches and subject to the constitutional protections against searches and seizures. *McLane Co., Inc. v. EEOC*, 137 S.Ct. 1159, 1169 (2017). Administrative subpoenas can obviate the need for a warrant where there is an opportunity for the subpoena to be challenged in court; the Ordinance provides no such means, neither requiring that the agency go to court to seek enforcement of a subpoena nor granting a recipient an avenue for judicial involvement. *See Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 415 (1984) (noting that an administrative search may proceed with only a subpoena where the subpoenaed party is sufficiently protected by the opportunity to "question the reasonableness of the subpoena, before suffering any penalties for refusing to comply with it, by raising objections in an action in district court").

The Ordinance itself provides no such avenue, as this Court has explained in its Memorandum Opinion. (Dkt. #64 at 30-38). But as the Supreme Court has stated, "[a business owner] who refuses to give an officer access to his or her registry can be arrested on the spot. The Court has held that business owners cannot reasonably be put to this kind of choice." *City of Los Angeles, Calif. v. Patel*, 135 S.Ct. 2443, 2452-54 (2015). And that is precisely the choice given to employers in the City: comply with the subpoena or be prosecuted.

The Court has properly rejected the City's attempt to salvage the constitutionality of the subpoena provision in the Ordinance by pointing to the City Code's general provision on subpoena issuance. (Dkt. #64 at 34-38). The subpoena provision of the Ordinance never refers to that general provision (even though it does refer to a penalty provision adjacent to it). *See* Dall. City Code § 20-10(b). And it explicitly states that the subpoena power created in the Ordinance is "pursuant to *this section*," not pursuant to any other provision of the City Code. *Id*. (emphasis added). The subpoena provision therefore does not provide for a means for a target to challenge the subpoena in a court before being subject to penalties for failing to comply.

The Court's reasoning in its Memorandum Opinion correctly rejected the City's argument that the general subpoena provision can trump the specific provision in the Ordinance. (Dkt. #64 at 34-38). Specifically,

> [t]o the extent the City contends that, regardless of incorporation into section 20-10(b), the general provisions of section 2-8 concerning administrative subpoenas control over the specific provisions of section 20-10(b), this

> argument also fails. As the Supreme Court has explained, "[i]t is a commonplace of statutory construction that the specific governs the general." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645, 132 S.Ct. 2065, 182 L.Ed.2d 967 (2012) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992)) (internal quotation marks omitted); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: INTERPRETATION OF LEGAL TEXTS 183–87 (2012) (explaining that a later enacted, more specific statute generally governs over an earlier, more general one).

(Dkt. #64 at 35-36). The Texas Code Construction Act provides further support for this interpretation. *See* Tex. Gov't Code Ann. § 311.026(b) ("If the conflict between the general provision and the special or local provision is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later enactment and the manifest intent is that the general provision prevail.").

B. On Its Face, the Ordinance Is Preempted by the Texas Minimum Wage Act and Thus Violates the Texas Constitution.

In its Memorandum Opinion, the Court found that the Ordinance is likely preempted by the Texas Minimum Wage Act. (Dkt. #64 at 47-55). The Court should affirm and enter summary judgment accordingly.

When a state's highest court has yet to speak on an issue, a federal court "must follow the decisions of intermediate state courts in the absence of convincing evidence that the highest court of the state would decide differently." *Stoner v. N.Y. Life Ins. Co.*, 311 U.S. 464, 467 (1940) (citations omitted). (Dkt. #64 at 48). This Court explained that it was bound to find the Ordinance preempted because

> Texas's Third Court of Appeals has already held that the TMWA preempts a city ordinance requiring private employers to provide paid sick leave. *See Tex. Ass'n of Bus. v. City of Austin*, 565 S.W.3d 425, 440 (Tex. App.—Austin 2018, pet. filed). Thus, the Court has the benefit of state court precedent specifically addressing TMWA preemption of a materially similar municipal paid sick leave ordinance. *See Mem'l Hermann Healthcare Sys., Inc. v. Eurocopter Deutschland, GMBH*, 524 F.3d 676, 678 (5th Cir. 2008) ("In making an *Erie* guess, [federal courts] defer to intermediate state appellate court decisions, 'unless convinced by other persuasive data that the highest court of the state would decide otherwise.'") (quoting *Herrmann Holdings Ltd. v. Lucent Techs., Inc.*, 302 F.3d 552, 558 (5th Cir. 2002)).

(Dkt. #64 at 41). This purely legal determination is no different at the summary judgment stage. Nothing about the relevant precedent has changed since this Court issued its Memorandum Opinion. Again, rather than submit duplicative briefing, the Plaintiffs incorporate by reference the briefing the Court already considered (Dkt. #3 at 13-23, #22, #24, #47 at 14-26) and respectfully request that the Court adhere to its analysis in its Memorandum Opinion.

III. Plaintiffs Meet the Requirements for a Permanent Injunction.

To be entitled to a permanent injunction, one must establish "(1) success on the merits; (2) that a failure to grant the injunction will result in irreparable injury; (3) that said injury outweighs any damage that the injunction will cause the opposing party; and (4) that the injunction will not disserve the public interest." *Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, 824 F.3d 507, 533 (5th Cir. 2016) (quoting *VRC LLC v. City of Dall.*, 460 F.3d 607, 611 (5th Cir. 2006)). "The standard for a preliminary injunction is essentially the same as for a permanent injunction with the

exception that the plaintiff must show a likelihood of success on the merits rather than actual success." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 546 n.12 (1987).

The similarity of the requirements for preliminary and permanent relief justify this Court in granting the latter based on its grant of the former.

A. Plaintiffs' Claims Succeed on the Merits.

As explained above regarding declaratory relief, the Court should reaffirm its reasoning from the Memorandum Opinion on the purely legal issues of the remaining claims in relation to the Ordinance.

B. Plaintiffs Will Suffer Irreparable Harm in the Absence of Permanent Injunctive Relief.

"When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." 11A C. Wright, A. Miller, & Mary Kay Kane, Federal Practice and Procedure, § 2948.1 at 161 (2d ed. 1995). The Ordinance violates the Employer Plaintiffs' fundamental right of Fourth Amendment protection from unreasonable search and seizure, and these injuries are irreparable by their nature. *See Covino v. Patrissi*, 967 F.2d 73, 77 (2d Cir. 1992) ("we agree with the district court–given the fundamental right involved, namely, the right to be free from unreasonable searches–that Covino has sufficiently demonstrated for preliminary injunction purposes that he may suffer irreparable harm arising from a possible deprivation of his constitutional rights."); *cf. Deerfield Medical Center v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981) ("We have already determined that the constitutional right of privacy is either threatened or in

fact being impaired, and this conclusion mandates a finding of irreparable injury.") (cleaned up).

Furthermore, the increased regulatory burden is itself an injury. *California v. Trump*, 267 F.Supp.3d 1119, 1133 (N.D. Cal. 2017) (holding that a state "incurring significant administrative costs" to respond to federal action suffers irreparable harm); *cf. Contender Farms, L.L.P.*, 779 F.3d at 266 ("An increased regulatory burden typically satisfies the injury in fact requirement.") (citation omitted).

It is also well established that spending money to comply with a law constitutes irreparable harm when there is no established avenue through which that money can later be recovered. *See Paulsson Geophysical Servs., Inc. v. Sigmar*, 529 F.3d 303, 312 (5th Cir. 2008) (per curiam) ("The absence of an available remedy by which the movant can later recover monetary damages may be sufficient to show irreparable injury.") (cleaned up); *see also Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring) ("[A] regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs."). Regarding their state law preemption claim, as the Court reasoned in its Memorandum Opinion, Employer Plaintiffs face this irreparable harm if the Ordinance is not enjoined as the City's governmental immunity likely bars all recovery by Employer Plaintiffs of their costs incurred when it is later found unlawful. (Dkt. #64 at 55-59).

Employer Plaintiffs' claim based on state law is precluded from being awarded damages due to governmental immunity bestowed on municipalities, such as the City, by Texas law. Here, Employer Plaintiffs' injuries have no remedy at law because

of the City's governmental immunity regarding claims under state law. Under Texas law, when performing governmental functions, political subdivisions derive governmental immunity from the state's sovereign immunity. *See Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n. 3 (Tex. 2003). Employer Plaintiffs have no remedy at law for the harm caused by the Ordinance.

Courts have routinely held that the inability to recover monetary damages because of sovereign immunity renders the harm suffered irreparable for injunction purposes. *See, e.g., Teladoc, Inc. v. Tex. Med. Bd.*, 112 F.Supp.3d 529, 543 (W.D. Tex. 2015) ("The possibility that the [State of Texas] will assert immunity from monetary damages as a state agency also weighs in favor of finding Plaintiffs face irreparable harm."); *Harris v. Cantu*, 81 F.Supp.3d 566, 580 (S.D. Tex. 2015), *rev'd sub nom. Harris v. Hahn*, 827 F.3d 359 (5th Cir. 2016) ("Because Defendants are entitled to Eleventh Amendment immunity from money damages, Plaintiff is unable to recover his past tuition payments that would not have been required from him but for his having been unconstitutionally excluded from the Act's benefits. Accordingly, Plaintiff has suffered and—if no injunction is issued—will continue to suffer irreparable injury for which money damages are inadequate.").

In its Memorandum Opinion, this Court also recognized that the sovereignty of the State of Texas is irreparably harmed by the Ordinance violating the Texas Minimum Wage Act, as

> [t]he state invariably suffers irreparable harm when it cannot enforce its laws. *Abbott v. Perez*, 138 S.Ct. 2305, 2324 n.17 (2018) (citing *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers)) ("[T]he inability to

> enforce its duly enacted plans clearly inflicts irreparable harm on the State."); *see also New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1352 (1977) (Rehnquist, J., in chambers) (holding that a state was irreparably harmed when a court enjoined the enforcement of its laws).

(Dkt. #64 at 56-57) (citations truncated). The Fifth Circuit has recently reasserted that a State is irreparably harmed when it is frustrated in its ability to enforce its statutes. *See Valentine v. Collier*, No. 20-20207, 2020 U.S. App. LEXIS 12941, at *11 (5th Cir. Apr. 22, 2020) (citing *King*, 567 U.S. 1301).

C. The Injury to Plaintiffs Outweighs any Damage a Permanent Injunction Would Cause the City, and an Injunction Is in the Public Interest.

For the same reasons that the Court determined that these related factors—that the injury outweighs any damage that the injunction will cause the opposing party, and that the injunction will not disserve the public interest—counseled in favor of granting a preliminary injunction, (Dkt. #64 at 59-60), these factors also support the issuance of a permanent injunction against enforcement of the Ordinance.

There is no public interest in the enforcement of an unlawful or unconstitutional ordinance. *N.Y. Progress & Protection PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013) ("[T]he Government does not have an interest in the enforcement of an unconstitutional law.") (cleaned up). The harms of the Ordinance to Employer Plaintiffs, discussed *supra*, are substantial. Given that the Ordinance has yet to go into effect, any benefits to any employees have yet to be materialized, making the status quo the neutral baseline; maintaining that state of affairs cannot properly be called inflicting a harm on the City or its interests. The novelty of the Ordinance—

the lack of any reliance interest—makes the weight on the City's side of the scale minimal compared to the massive disruption of Employer Plaintiffs' businesses.

Furthermore, because the Ordinance violates the right of Employer Plaintiffs to be free of unreasonable searches and seizures, the Court should issue a permanent injunction because "it is always in the public interest to prevent the violation of a party's constitutional rights," *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 n.9 (5th Cir. 2014) (citation omitted) (quoting *Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012); *cf. Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir. 2009) ("Notwithstanding this balancing approach, when a party seeks a preliminary injunction on the basis of a potential violation of the First Amendment, the likelihood of success on the merits often will be the determinative factor.") (internal quotation marks omitted).

Finally, any purported interest of the City in enforcing the Ordinance disappears upon the Court's finding that it violates Texas State law, as the Court explained in its Memorandum Opinion:

> The State of Texas is "inviolably sovereign," *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 429 (Tex. 2016), and its legislature stands above local governments, *see* TEX. CONST. art XI, § 5(a). As the State has correctly noted, each day the Ordinance operates against the express mandate of the Texas legislature to preempt local laws governing wages, the State's sovereignty is violated and the relationship between the legislature and local governments, guaranteed by the Texas Constitution, is turned on its head. Further, allowing the continued accrual of benefits under an Ordinance that is most likely unenforceable, as well as the continued imposition of unrecoverable expenses on

> regulated businesses, also is not consistent with the public interest.

(Dkt. #64 at 60). The City may claim it has a public interest in mandating that employers provide paid sick leave to their employees, but it can have no interest in enforcing an ordinance that is preempted by State law.

The balance of interests favors the grant of a preliminary injunction against enforcement of the Ordinance.

CONCLUSION

There are no factual disputes that can save the City from summary judgment. For the same reasons that the Court preliminarily enjoined the enforcement of the Ordinance, it should grant summary judgment on behalf of Plaintiffs, declare the Ordinance unlawful, and permanently enjoin its enforcement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing document was electronically filed on May 7, 2020 with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/Robert Henneke
ROBERT HENNEKE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

ESI/EMPLOYEE SOLUTIONS, LP, and HAGAN LAW GROUP LLC; ***Plaintiffs***, v. CITY OF DALLAS; ERIC JOHNSON, in his official capacity as Mayor of the City of Dallas; T.C. BROADNAX, in his official capacity as City Manager of the City of Dallas; and BEVERLY DAVIS, in her official capacity as Director of the City of Dallas Office of Equity and Human Rights, ***Defendants***.	§	CIVIL ACTION NO. _____ JUDGE _____

DECLARATION OF DAVID F. BRISTOL

I, David F. Bristol, hereby declare as follows:

1. I am over the age of eighteen (18) and am competent to testify in this matter. I have personal knowledge of the following facts and if called upon to do so could competently testify to them under oath. As to those matters which reflect a matter of opinion, they reflect my personal opinion and judgment upon the matter.

2. I am the Chief Executive Officer of ESI/Employee Solutions, LP and I am authorized to sign this declaration on its behalf.

3. ESI/Employee Solutions, LP is a for-profit corporation incorporated in the State of Texas and headquartered in the City of Plano in Collin County, Texas. It provides temporary staffing in various industries.

4. ESI/Employee Solutions, LP employs over 300 temporary employees within the

City of Dallas at any given time and will be injured by the provisions of the Paid Sick Leave Ordinance.

5. ESI/Employee Solutions, LP has not chosen to be a unionized employer and its employees working within the City of Dallas are not subject to a collective bargaining agreement.

6. ESI/Employee Solutions, LP maintains business records that are proprietary and confidential for which it would not want to disclose to the City of Dallas.

7. If the Paid Sick Leave Ordinance goes into effect, ESI/Employee Solutions, LP will have unique and particularized injury due to the itinerant and mobile nature of their workforces and the burdens imposed by the Paid Sick Leave Ordinance. Keeping track of how many hours of the day each employee is working within the City of Dallas, as opposed to nearby cities, will be an enormously costly undertaking for which ESI/Employee Solutions, LP does not currently have budgeted resources to implement.

8. Like most staffing companies, ESI/Employee Solutions, LP provides workers with a gateway to employment. The very nature of ESI/Employee Solutions, LP's business is temporary work – the service that ESI/Employee Solutions, LP's clients contract for and the type of work that Employee Solutions' employees choose to obtain. Where ESI/Employee Solutions, LP exists to fill gaps in the workforce needs of other businesses, it is contrary to this business model to require Employee Solutions to provide paid leave to workers whose job is to fill in for vacant positions.

9. Also, staffing companies such as ESI/Employee Solutions, LP will have to pay double the labor cost when employees use the benefits mandated by the Paid Sick Leave Ordinance because of the nature of their business. For example, consider a scenario where a business has an employee out sick, and asks a staffing company to provide a temporary one. If the staffing

company calls an employee to see if he is available to work the position for 8 hours that day, and the employee responds that he is ill and will now take his paid sick leave, the staffing company will have to pay him for 8 hours and also pay another employee for 8 hours to work the vacant position.

10. ESI/Employee Solutions, LP has over 300 employees in the City, who make an average of $12.85 an hour. Based on the requirements of the Paid Sick Leave Ordinance, Plaintiff ESI/Employee Solutions, LP estimates that leave paid out will be approximately $269,000.00 annually if each of its Dallas employees take the full amount of paid leave they would be entitled to under the Paid Sick Leave Ordinance.

11. ESI/Employee Solutions, LP will also need to hire an additional employee to track where employees are placed, track their hours, calculate leave earned, and send the monthly reports required by the Paid Sick Leave Ordinance; this is estimated to cost approximately $60,000.00 annually in salary and benefits.

12. ESI/Employee Solutions, LP will also need to change its training manuals, handbooks, and orientation materials, and estimates that its software company will charge $500.00 to make changes to its application and documents. Plaintiff ESI/Employee Solutions, LP also estimates that it will also need to provide approximately $3,000.00 in labor to make changes to relevant policies, and that it would have to spend approximately

$1,500.00 in staff training time and travel to training.

13. The additional expense required of the mandates of the Paid Sick Leave Ordinance would require ESI/Employee Solutions, LP to rearrange the mix of pay and benefits for its employees. It could have to raise rates for clients, which would likely result in lower wages they would be willing to pay their temporary employees placed by ESI/Employee Solutions, LP. Additionally, ESI/Employee Solutions, LP currently provides paid holiday leave for its employees; because that is not legally required, the increased costs of a mandate to provide paid sick leave would likely require it to eliminate paid holiday leave.

Pursuant to 28 U.S.C. § 1746, I, David F. Bristol, declare under penalty of perjury that the foregoing is true and correct. Executed on this July 29, 2019, in Plano, Texas.

David F. Bristol

DAVID F. BRISTOL
Chief Executive Officer
ESI/Employee Solutions LP

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

ESI/EMPLOYEE SOLUTIONS, LP, and HAGAN LAW GROUP LLC; ***Plaintiffs***, v. CITY OF DALLAS; ERIC JOHNSON, in his official capacity as Mayor of the City of Dallas; T.C. BROADNAX, in his official capacity as City Manager of the City of Dallas; and BEVERLY DAVIS, in her official capacity as Director of the City of Dallas Office of Equity and Human Rights, ***Defendants***.	§	CIVIL ACTION NO. _____ JUDGE _____

DECLARATION OF JOHN P. HAGAN

I, John P. Hagan, hereby declare as follows:

1. I am over the age of eighteen (18) and am competent to testify in this matter. I have personal knowledge of the following facts and if called upon to do so could competently testify to them under oath. As to those matters which reflect a matter of opinion, they reflect my personal opinion and judgment upon the matter.

2. I am the Founder of Hagan Law Group LLC and I am authorized to sign this declaration on its behalf.

3. Hagan Law Group LLC is a for-profit corporation incorporated in the State of Texas and based in the City of Allen in Collin County, Texas. It provides legal counseling and representation to employers and executives in various industries located in Texas.

4. Hagan Law Group operates in the City of Dallas and will be affected by the

provisions of the Paid Sick Leave Ordinance.

5. Hagan Law Group LLC maintains business records that are proprietary and confidential for which it would not want to disclose to the City of Dallas.

6. Hagan Law Group LLC currently employs one attorney who works full-time remotely from home within the City of Dallas. Hagan Law Group LLC and its Dallas-based attorney have negotiated terms and conditions of employment that provide the employee a more flexible schedule and mutually agreed compensation in exchange for not having other benefits like paid leave.

7. Furthermore, as a labor and employment law firm, Hagan Law Group employees appear in court and engage in other client related matters within the City of Dallas on average for more than 80 hours total per year and will be affected by the provisions of the Paid Sick Leave Ordinance.

8. Hagan Law Group LLC has not chosen to be a unionized employer and its employee working within the City of Dallas is not subject to a collective bargaining agreement.

9. In response to the Paid Sick Leave Ordinance, Hagan Law Group LLC will be required to use a different and more complex time reporting/tracking software than what it uses currently. It has estimated that legal reporting/billing software allowing the tracking of work locations and absences, with whole day or partial days, will cost an additional $3,000.00 annually. The hours to train support staff and the attorneys on a new system will cost approximately $2,800.00.

10. The issuance of monthly statements required by the Paid Sick Leave Ordinance would cost Hagan Law Group LLC approximately $600.00 annually.

11. Hagan Law Group LLC estimates the total cost of modifying its operations to

ensure compliance with the Paid Sick Leave Ordinance would be $6,400.00 for the first year and $4,000.00 for each year thereafter. In addition, the cost of the payout for sick leave (and for substitute wages for of counsel needed when an employee takes leave) would amount to a minimum of $14,000.00 per year (plus payroll taxes) for one employee working in the City.

12. The additional expense required of the mandates of the Paid Sick Leave Ordinance would require Hagan Law Group LLC to rearrange the mix of pay and benefits for its employees. It could delay planned wage increases or bonuses for other staff. It could have to raise rates for clients or reduce overall employee compensation. It is also possible that Hagan Law Group LLC would be forced to cancel its $5,500.00 per year Westlaw subscription, cancel plans to replace antiquated computer equipment, and eliminate year-end bonuses.

Pursuant to 28 U.S.C. § 1746, I, John P. Hagan, declare under penalty of perjury that the foregoing is true and correct. Executed on this July 29, 2019, in Allen, Texas.

JOHN P. HAGAN
Founder
Hagan Law Group LLC

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

ESI/EMPLOYEE SOLUTIONS, LP; HAGAN LAW GROUP LLC; and STATE OF TEXAS, ***Plaintiffs,*** v. CITY OF DALLAS; T.C. BROADNAX, in his official capacity as City Manager of the City of Dallas; and BEVERLY DAVIS, in her official capacity as Director of the City of Dallas Office of Equity and Human Rights, ***Defendants.***	§	NO. 4:19-CV-00570-SDJ

[PROPOSED] ORDER GRANTING PLAINTIFFS' JOINT MOTION FOR SUMMARY JUDGMENT

The Court, having considered Plaintiffs' Joint Motion for Summary Judgment and all memoranda submitted in support of and in opposition to the motion, as well as the applicable law, concludes that the motion has merit and should be, and hereby is GRANTED. The Court DECLARES that the City of Dallas's paid sick leave ordinance, Dall. City Code § 20-1—20-12, in unlawful, and Defendants are hereby PERMANENTLY ENJOINED from enforcing the ordinance.