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.	§	CIVIL ACTION NO. 4:19-cv-00570-SDJ
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.	§	

DEFENDANTS' MOTION TO DISMISS UNDER RULE 12(b)(1), RENEWED MOTION TO DECLINE SUPPLEMENTAL JURISDICTION, AND MEMORANDUM IN SUPPORT

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Defendants City of Dallas (the "City"); 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 (collectively, "Defendants") file this motion to dismiss Plaintiffs' First Amended Complaint for Declaratory and Injunctive Relief pursuant to Rule 12(b)(1) and renewed motion to decline supplemental jurisdiction. In support, Defendants would show the Court as follows:

I. STATEMENT OF ISSUES AS TO DEFENDANTS' MOTION TO DISMISS AND RENEWED MOTION TO DECLINE SUPPLEMENTAL JURISDICTION

1. Should the Fourth Amendment claim brought by Plaintiffs Hagan and ESI/Employee Solutions ("Employer Plaintiffs") be dismissed as moot due to recent changes in the Dallas City Code related to pre-compliance review for administrative subpoenas?

2. Should the Court decline to exercise supplemental jurisdiction over Plaintiffs' state law claim given that the only remaining federal claim in this action is moot and should be dismissed?

II. STATEMENT OF FACTS

On April 24, 2019, the Dallas City Council adopted Ordinance No. 31181 (the "Ordinance") after a public meeting. *See* Ex. 1 (Ordinance). The Ordinance applies to most private employers that employ individuals who provide at least eighty hours of paid work in the City in a calendar year, excluding the federal government; the state or any department, agency, or political subdivision of the state; the City; or other agency that cannot be regulated by City ordinance. Dallas, Tex., Code § 20-2(5, 6). Generally, the Ordinance provides that employees who work in the City receive as a benefit one hour of earned sick time for every thirty hours worked for the employer in the City. *Id.* § 20-4(a). If the Ordinance were in effect, the Office would have the authority to investigate complaints of violations and assess civil penalties for

violations on written notice for employers with more than five employees as defined by the Ordinance. Dallas, Tex., Code §§ 20-10, -11.

This action was originally filed by Employer Plaintiffs on July 30, 2019, along with a motion for preliminary injunction. (Dkt. No. 3.) The Ordinance went into effect on August 1, 2019, for employers with more than five employees. Ex. 1 § 5. The live pleading in this action, the First Amended Complaint for Declaratory and Injunctive Relief ("Amended Complaint"), was filed on August 6, 2019, adding the State of Texas (the "State") as a plaintiff. (Dkt. No. 9.) On September 30, 2019, Defendants filed a motion to dismiss under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. (Dkt. No. 36.) On March 30, 2020, the Court dismissed Employer Plaintiffs' claims under the First and Fourteenth Amendment and otherwise denied Defendants' motion to dismiss. (Dkt. No. 64.) In the same order, the Court granted Plaintiffs' motion for preliminary injunction and enjoined the City from enforcing the Ordinance. (*Id.*)

On May 13, 2020, the Dallas City Council passed Ordinance No. 31533. That ordinance amended section 2-8 of the Dallas City Code to specifically clarify the process for petitioning the Dallas Municipal Court to quash or modify an administrative subpoena issued under the Ordinance as well as other sections of the Dallas City Code before the return date in the subpoena. *See* Ex. 2 (Ordinance No. 31533). The section was amended by adding:

> A person receiving a subpoena in accordance with this section may, before the return date specified in the subpoena, petition the corporation court for a motion to modify or quash the subpoena. This provision for pre-compliance review applies to all subpoenas, including but not limited to those issued pursuant to Chapter III, XIII, and XVI of the City Charter or Sections 19-9, 20-10, 20A-8, 37-35, 37A-4, 40A-4, 46-10, or 50-3 of this code unless a separate pre-compliance review is provided.

III. ARGUMENT AND AUTHORITIES

A. Applicable Legal Standards

1. Motion to Dismiss Under Rule 12(b)(1)

"Federal courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). The plaintiff bears the burden of overcoming the presumption "that a cause lies outside this limited jurisdiction." *Id.* Subject-matter jurisdiction must exist "through all stages of federal judicial proceedings, trial and appellate. . . . [I]t is not enough that a dispute was . . . alive when suit was filed . . . ." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3).

In reviewing a Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction, the district court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981). The court may rely on "(1) the complaint alone; (2) the complaint supplemented by undisputed facts; or (3) the complaint supplemented by undisputed facts and the court's resolution of disputed facts." *Id.* A factual attack on subject-matter jurisdiction based on matters outside the complaint is treated differently in a motion under Rule 12(b)(1) than it would be under Rule 12(b)(6). *Id.* at 412-13. In a Rule 12(b)(1) motion, "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Id.* at 413. This is so because "[j]urisdictional issues are for the court – not a jury – to decide, whether they hinge on legal or factual determinations." *Id.*

2. Motion to Decline Supplemental Jurisdiction

A district court may decline to exercise supplemental jurisdiction over a state law claim if:

(1) the claim raises a novel or complex issue of State law,

> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367. In addition, in determining whether to exercise supplemental jurisdiction, courts should consider the common law factors of judicial economy, convenience, fairness, and comity." *Enochs v. Lampasas Cnty.*, 641 F.3d 155, 159 (5th Cir. 2011).

B. Employer Plaintiffs' Fourth Amendment Claim Is Moot.

In their Fourth Amendment claim, Employer Plaintiffs assert that the Ordinance "requires employers to submit to unlimited, unreasonable administrative subpoenas with no provision for judicial review before being required to comply." Am. Compl. ¶ 65. Because the Dallas City Code has been amended to specifically eliminate any question that the Code provides for pre-compliance review for administrative subpoenas issued pursuant to the Ordinance, Employer Plaintiffs' Fourth Amendment claim has been rendered moot. *See, e.g.*, *New York State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525 (2020) (holding that claims for declaratory and injunctive relief had become moot due to city's amendment of rules that were basis of claim). "Mootness is 'the doctrine of standing in a time frame. The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness).'" *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 661 (5th Cir. 2006) (quoting *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980)). That is, "an 'actual controversy' must exist not only 'at the time the complaint is filed,' but through 'all stages' of the litigation." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90-91 (2013) (quoting *Alvarez v. Smith*, 558 U.S. 87, 92 (2009); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997)). "If a case has been rendered moot, a federal court has no constitutional authority to resolve the issues that it

presents." *Envtl. Conservation Org. v. City of Dallas*, 529 F.3d 519, 525 (5th Cir. 2008). "A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *Already*, 568 U.S. at 91 (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam)). Even where the parties "vehemently . . . continue to dispute the lawfulness of the conduct that precipitated the lawsuit," a dispute is moot if it "is no longer embedded in any actual controversy about the plaintiffs' particular legal rights." *Id.* (quoting *Alvarez*, 558 U.S. at 93).

While Defendants maintain that section 2-8 of the Dallas City Code as it existed at the time the Ordinance was enacted was sufficient to ensure pre-compliance review of any administrative subpoena issued pursuant to the Ordinance, the City has subsequently amended section 2-8 to address concerns expressed in the Court's March 30, 2020 memorandum opinion and order ("March 30 Order") regarding whether section 2-8's general provisions control and whether section 2-8 provides for pre-compliance review that meets the requirements of the Fourth Amendment. *See* Mar. 30 Order at 37-38. The section was amended by adding:

> A person receiving a subpoena in accordance with this section may, before the return date specified in the subpoena, petition the corporation court for a motion to modify or quash the subpoena. This provision for pre-compliance review applies to all subpoenas, including but not limited to those issued pursuant to Chapter III, XIII, and XVI of the City Charter or Sections 19-9, 20-10, 20A-8, 37-35, 37A-4, 40A-4, 46-10, or 50-3 of this code unless a separate pre-compliance review is provided.

See Ex. 2. The amended section 2-8 specifically provides for pre-compliance review by the Dallas Municipal Court[1] for administrative subpoenas issued pursuant to the Ordinance (section 20-10 of the Dallas City Code). The amendments clarify the process for obtaining pre-compliance review and ensure that anyone served with an administrative subpoena under the Ordinance will have the

[1] Corporation court is the municipal court. Tex. Gov't Code § 29.002.

"opportunity to question the reasonableness of the subpoena, before suffering any penalties for refusing to comply with it . . . ." *Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 415 (1984).

The City amended section 2-8 rather than just the Ordinance to ensure that the Court's concerns were addressed as to *all* administrative subpoenas issued under the Dallas City Charter or Dallas City Code. The Texas Code Construction Act relating to the interpretation of conflicting general and special provisions states:

> (a) If a general provision conflicts with a special or local provision, the provisions shall be construed, if possible, so that effect is given to both.
> (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.

Tex. Gov't Code § 311.026. While the City contends that there was and is no conflict between the prior and current versions of section 2-8 and section 20-10 of the Dallas City Code and that the provisions can easily be construed to give effect to both, it is clear that the current section 2-8 prevails under the Texas Code Construction Act. Since the amendment to section 2-8 was enacted on May 13, 2020, it is the later enactment. Additionally, its manifest intent is that the general requirements for pre-compliance review in section 2-8 apply to section 20-10 as well as all other sections of the Dallas City Charter and Dallas City Code that authorize the issuance of subpoenas. Therefore, the amendments to section 2-8 provide for pre-compliance review of any administrative subpoenas issued under the Ordinance, and Employer Plaintiffs' facial challenge to the Ordinance under the Fourth Amendment no longer constitutes an actual controversy.

When the assertion of mootness is based on a defendant's voluntary conduct, "[t]he defendant must demonstrate that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Envtl. Conservation Org.*, 529 F.3d at 527 (quoting *Carr v. Alta Verde Indus., Inc.*, 931 F.2d 1055, 1062 (5th Cir.1991)). Here, however, as set out in

Defendants' September 30, 2019 motion to dismiss (Dkt. No. 36) and in Defendants' response to Plaintiffs' Joint Motion for Summary Judgment filed concurrently with this motion and incorporated herein by reference, Employer Plaintiffs' Fourth Amendment challenge to the Ordinance is a facial rather than an as-applied challenge, and therefore, there is no showing that any allegedly wrongful behavior ever did occur. Moreover, the City did not simply amend the Ordinance at issue here in an attempt to moot Plaintiffs' claim. Rather, the City had previously asserted that pre-compliance review existed. To address the Court's concerns that such review was not expressly stated, the City amended its general ordinance relating to any administrative subpoena issued by the City in an attempt to ensure that the City's processes as to pre-compliance review of administrative subpoenas are constitutionally adequate as to *all* administrative subpoenas issued by the City, including those issued under the Ordinance.

This case is no different from the recent Supreme Court decision in *New York State Rifle & Pistol Ass'n v. City of New York*. There, as here, the plaintiffs were seeking only injunctive and declaratory relief, and the Supreme Court, with little difficulty, determined that the plaintiffs' claim was mooted when New York City amended the rules at issue to voluntarily provide the relief plaintiffs sought. *New York State Rifle*, 140 S. Ct. at 1526. Here, Employer Plaintiffs' Fourth Amendment claim is that the Ordinance did not clearly provide pre-compliance review of administrative subpoenas, so the City has amended its Code to clarify that any administrative subpoena issued under the City Charter or the City Code is subject to pre-compliance review in the Dallas Municipal Court. Therefore, the amendment fully resolves Employer Plaintiffs' complaint under the Fourth Amendment.

To the extent that Employer Plaintiffs might argue that, unlike in *New York State Rifle*, their request for relief under their Fourth Amendment claim is broader than a request for

declaratory and injunctive relief enjoining the enforcement of section 20-10(b) of the Dallas City Code or creating a process for pre-compliance review, that argument fails because it is not appropriate to permanently enjoin the entire Ordinance based solely on Employer Plaintiffs' Fourth Amendment claim. As the Supreme Court has stated, "The unconstitutionality of a part of an act does not necessarily defeat or affect the validity of its remaining provisions. Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Champlin Refining Co. v. Corp. Comm'n of State of Okla.*, 286 U.S. 210, 234 (1932); *see, e.g.*, *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984). The Dallas City Council clearly stated in the Ordinance, "[T]he terms and provisions of this ordinance are severable . . . ." Ex. 1 § 4. The Ordinance then references section 1-4 of the Dallas City Code, which states:

> It is hereby declared to be the intention of the city council that the sections, paragraphs, sentences, clauses, and phrases of this code are severable, and if any phrase, clause, sentence, paragraph or section of this code shall be declared unconstitutional or invalid by the valid judgment or decree of any court of competent jurisdiction, such unconstitutionality or invalidity shall not affect any of the remaining phrases, clauses, sentences, paragraphs and sections of this code, since the same would have been enacted by the city council without the incorporation in this code, of any such unconstitutional or invalid phrase, clause, sentence, paragraph or section.

Dallas, Tex., Code § 1-4. It is, therefore, unmistakably the intention of the Dallas City Council that provisions of the Ordinance are severable. Furthermore, given the limited nature of the provision at issue in Employer Plaintiffs' Fourth Amendment claim, it is clear that the Dallas City Council would have enacted the rest of the Ordinance without that provision.

For local ordinances, severability is a question of state law. *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 772 (1988). Under Texas law, "[w]hen an ordinance contains an express severability clause, the severability clause prevails when interpreting the ordinance." *City of Houston v. Bates*, 406 S.W.3d 539, 549 (Tex. 2013) (citing Tex. Gov't Code § 311.032(a)).

Here, there is both a specific severability clause in the Ordinance and a general one covering any provision in the Dallas City Code, making section 20-10(b) of the Dallas City Code clearly severable. Since this provision is severable, Employer Plaintiffs' Fourth Amendment claim does not provide a sufficient basis on its own to enjoin the Ordinance in its entirety. Employer Plaintiffs did not request damages, only declaratory and injunctive relief. Therefore, the City's amendment of section 2-8 of the Dallas City Code to explicitly provide a process for pre-compliance review as to any administrative subpoenas issued pursuant to the Dallas City Charter or Dallas City Code eliminates any basis for relief on Employer Plaintiffs' Fourth Amendment claim.

Because there is no longer a case or controversy as to Employer Plaintiffs' Fourth Amendment claim, the Fourth Amendment claim should be dismissed for lack of jurisdiction due to mootness.

C. The Court Should Decline to Exercise Supplemental Jurisdiction Over the State Law Claim.

Because the Fourth Amendment claim is now moot, the only remaining claim in this action is the state law preemption claim. Defendants incorporate by reference the arguments in section III.B.7 of Defendants' Response in Opposition to Motion for Preliminary Injunction (Dkt. No. 12), section III.B.1 of Defendants' Response in Opposition to State of Texas's Motion for Preliminary Injunction (Dkt. No. 32), section III.D.1 of the September Motion (Dkt. No. 36), and section A of Defendants' reply to the State's response to the September Motion (Dkt. No. 55) as if fully set forth herein. In addition to the reasons previously set out for declining supplemental jurisdiction, the Court should now also decline to exercise supplemental jurisdiction over the state law preemption claim under 28 U.S.C. § 1367(c)(3) because the last remaining claim over which this Court has original jurisdiction is moot and should be dismissed.

In its March 30 Order, the Court previously determined that the issue of whether the state law claim substantially predominated over the federal claims was neutral. Mar. 30 Order at 43. With respect to predominance, "if it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726-27 (1966). As Defendants have previously argued, the state law claim is the only claim that relates to the Ordinance in its entirety. Employer Plaintiffs' remaining federal claim relates solely to a limited provision of the Ordinance – section 20-10(b), and as discussed above, although Employer Plaintiffs purport to seek the same remedy as to both their Fourth Amendment and state law claims, the remedy sought is inappropriately overbroad as to their Fourth Amendment claim.

In the March 30 Order, the Court acknowledged that "the remedy for the federal claim may be narrowed later," but determined that was irrelevant because the issue was the remedy sought. Mar. 30 Order at 43. This determination, however, would allow a plaintiff to avoid the effect of the predominance factor simply by requesting overly broad relief for their federal claims even if, as here, such relief is not appropriate as a matter of law. Other cases have instead looked to whether the exercise of supplemental jurisdiction over state law claims expanded the remedy available for the federal claim. *See, e.g.*, *Lage v. Thomas*, 585 F. Supp. 403, 407-08 (N.D. Tex. 1984) (determining that exercise of pendent jurisdiction would be inappropriate because it "would contravene the intent behind Title VII by circumventing the limited scope of relief available under Title VII"). Here, because, even if the Fourth Amendment claim were not moot, it would not be appropriate to enjoin the entire Ordinance based solely on that claim, the state law claim

substantially predominates because it expands the otherwise limited scope of relief available to Employer Plaintiffs in connection with their federal claim.

Furthermore, as discussed in Defendants' prior briefing on this issue, the State is only a party to the state law claim. It does not have any claims against the City over which this Court has original jurisdiction. The fact that the State is a party only to the state law claim, and the unique issues involved with the State's claim, including its assertions in Plaintiffs' Joint Motion for Summary Judgment of special status as to standing and obtaining a permanent injunction establish that the level of proof and scope of issues raised for the state law claim substantially predominate over the remaining federal claim.

Turning to the common law factors, as the Court stated in the March 30 Order, "'[I]n the usual case in which all federal law claims are eliminated before trial' the common law factors 'will point toward declining to exercise [supplemental] jurisdiction.'" Mar. 30 Order at 40 (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988)). In fact, the Fifth Circuit has determined in other cases that a district court abused its discretion by retaining state law claims when the claims over which it had original jurisdiction were dismissed before trial. *See, e.g.*, *Watson v. City of Allen*, 821 F.3d 634 (5th Cir. 2016); *Enochs*, 641 F.3d 155; *Parker & Parsley Petroleum Co. v. Dresser Indus.*, 972 F.2d 580 (5th Cir. 1992). The Court already found in the March 30 Order that the convenience and fairness factors are neutral in this case. Mar. 30 Order at 43. Nothing has changed since that decision to alter the Court's previous findings as to those factors.

With respect to comity, as the Supreme Court has stated, "Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *United Mine Workers*, 383 U.S. at

726. "[C]omity demands that the 'important interests of federalism and comity' be respected by federal courts, which are courts of limited jurisdiction and 'not as well equipped for determinations of state law as are state courts.'" *Enochs*, 641 F.3d at 160 (quoting *Parker & Parsley*, 972 F.2d at 588-89). "Texas courts have a strong interest in deciding whether Texas legislation comports with the Texas Constitution . . . ," *Watson*, 821 F.3d at 642, or in this case, whether an ordinance enacted by a Texas home-rule municipality comports with Texas law and the Texas Constitution. On such issues, Texas courts, and the Texas Supreme Court in particular, "speak with an authority rightly denied federal courts." *Id.* Like the suit at issue in *Watson*, "[t]his lawsuit touches on multiple issues of state importance while impacting no federal policy." *Id.* (quoting *United Mine Workers*, 383 U.S. at 726-27). Therefore, as in *Watson*, "[c]onsiderations of comity weigh dramatically in favor of remand." *Id.*

With respect to the judicial economy factor, the Court previously determined that it weighed "slightly in favor of retaining the case." Mar. 30, 2020 Mem. Op. & Order at 44. The Court explained, "It is not economical to require a case that could be resolved in one court to proceed in two courts." *Id.* at 44. Because the Fourth Amendment claim should now be dismissed as moot, it is no longer true that the case would need to proceed in two courts. Instead, it can be dismissed and refiled in state court and proceed only in state court. To the extent that Plaintiffs may argue that the judicial economy factor would still weigh in favor of retaining the case due to prior briefing in this Court, the Fifth Circuit has already addressed similar arguments in other cases. In *Watson*, for example, the court noted that "though the question of state law . . . has been extensively litigated, '[l]ittle new legal research would be necessary' to put these arguments before a Texas state court." *Id.* (citing *Parker & Parsley*, 972 F.2d at 587); *see also Guzzino v. Felterman*, 191 F.3d 588, 595 (5th Cir. 1999) (judicial economy factor favored remand where, despite

"substantial pretrial activity," "the parties' work product could be taken, with little loss, to the state litigation"). The judicial economy factor, therefore, no longer weighs in favor of retaining jurisdiction.

At a minimum the statutory factors of predominance and dismissal of claims over which this Court had original jurisdiction favor declining to exercise supplemental jurisdiction. As to the common law factors, considerations of comity weigh strongly in favor of declining jurisdiction, and the other factors are at most neutral and certainly do not weigh in favor of retaining jurisdiction strongly enough to outweigh the comity considerations. Therefore, this Court should not retain supplemental jurisdiction over the state law claim but instead dismiss it without prejudice to refiling in state court.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that Employer Plaintiffs' claim for violation of the Fourth Amendment be dismissed for lack of subject-matter jurisdiction due to mootness, that the Court decline to retain supplemental jurisdiction over Plaintiffs' state law claim and dismiss it without prejudice to be refiled in state court, and that the Court grant Defendants such other relief as the Court finds just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 26, 2020, I electronically filed the foregoing document with the clerk of court for the United States District Court for the Eastern District of Texas using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to all counsel of record who have consented in writing to accept this notice as service of this document by electronic means.

s/ *Kathleen M. Fones*
Kathleen M. Fones

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.	§ § § § § § § § § § § § § § § §	CIVIL ACTION NO. 4:19-cv-00570-SDJ

DECLARATION OF KATHLEEN MACINNES FONES

I, Kathleen MacInnes Fones, hereby declare as follows:

1. I am over the age of eighteen and am otherwise competent to make this declaration. I have personal knowledge of the facts stated in this declaration, all of which are true and correct.

2. I am an Assistant City Attorney for the City of Dallas (the "City") and have been licensed to practice law in the State of Texas for more than 14 years. I am lead counsel for the City, T.C. Broadnax, in his official capacity as City Manager of the City; and Beverly Davis, in her official capacity as Director of the City's Office of Equity and Human Rights (collectively, "Defendants") in the above-styled and numbered case. I am authorized by the City to file this declaration.

3. Exhibit 1 to this declaration is a true and correct copy of Ordinance No. 31181 adopted by the Dallas City Council on April 24, 2019.

4. Exhibit 2 to this declaration is a true and correct certified copy of Ordinance No. 31533 adopted by the Dallas City Council on May 13, 2020.

Pursuant to 28 U.S.C. § 1746, I, Kathleen MacInnes Fones, declare under penalty of perjury that the foregoing is true and correct. Executed on this 26th of June, 2020, in Dallas County, Texas.

KATHLEEN MACINNES FONES

4-24-19

ORDINANCE NO. 31181

An ordinance amending the Dallas City Code by adding a new Chapter 20, "Earned Paid Sick Time," requiring private employers to establish and administer earned paid sick time policies that employees who work in the City of Dallas may use if an employee or an employee's family member experiences physical or mental illness, injury, stalking, domestic abuse, sexual assault, or needs preventative care; providing definitions; providing that employers must provide one hour of earned paid sick time for every 30 hours of time worked; providing a yearly cap of 64 hours of paid sick time per employee for medium or large employers; providing a yearly cap of 48 hours of paid sick time per employee for small employers; providing that employees must generally be able to carry over unused paid sick time to the following year; providing procedures for an employee to request earned paid sick time off; providing that an employer may not retaliate against an employee for using earned paid sick time or for making a complaint to the director; providing a process for employees to complain to the director; providing an investigation process for the director; providing a civil penalty not to exceed $500; providing the right to appeal the assessment of a civil penalty; providing for a multilingual education campaign to educate the public about this ordinance; providing a savings clause; providing a severability clause; and providing an effective date.

WHEREAS, most workers in the City of Dallas will at some time during each year need limited time off from work to care for their own health and safety needs or the health and safety needs of a close family member; and

Exhibit 1

31181 190618

WHEREAS, denying earned paid sick time to employees is detrimental to the health, safety, and welfare of the residents of the City of Dallas; and

WHEREAS, the lack of earned paid sick time for employees contributes to employee turnover and unemployment, and harms the local economy; and

WHEREAS, the City of Dallas, as a home-rule municipality, has the ability to address matters of public health and safety, and now finds that establishing earned paid sick time requirements is a matter of public health and safety; Now, therefore,

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF DALLAS:

SECTION 1. That Chapter 20, "Reserved," of the Dallas City Code is amended to read as follows:

"CHAPTER 20
EARNED PAID SICK TIME [~~RESERVED~~]

ARTICLE I.
GENERAL PROVISIONS.

SEC. 20-1. PURPOSE.

(a) The purpose of this chapter is to protect the health, safety, and welfare of the people of the City of Dallas by providing employees with the ability to accrue and use earned paid sick time when they need to be absent from work because the employee or the employee's family member suffers illness, injury, stalking, domestic abuse, sexual assault, or otherwise requires medical or health care, including preventative care and mental health care.

(b) The denial or deprivation of earned paid sick time to employees is detrimental to the health, safety, and welfare of the residents of Dallas and is within the power and responsibility of the city to prevent.

SEC. 20-2. DEFINITIONS.

In this chapter:

(1) CITY means the City of Dallas, Texas.

(2) DEPARTMENT means the department designated by the city manager to implement, administer, and enforce this chapter.

(3) DIRECTOR means the director of the department designated by the city manager to implement, administer, and enforce this chapter and includes representatives, agents, or department employees designated by the director.

(4) EARNED PAID SICK TIME means a period of paid leave from work accrued by an employee in accord with this chapter.

(5) EMPLOYEE means an individual who performs 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. Employee does not mean an individual who is an independent contractor according to Title 40, Section 821.5 of the Texas Administrative Code. Employee does not mean an unpaid intern.

(6) EMPLOYER means any person, company, corporation, firm, partnership, labor organization, non-profit organization, or association that pays an employee to perform work for an employer and exercise control over the employee's wages, hours, and working conditions. The term does not include:

(A) the United States government, any of its departments or agencies, or any corporation wholly owned by it;

(B) the government of the State of Texas or any of its departments, agencies, or political subdivisions;

(C) the City of Dallas, Texas; or

(D) any other agency that cannot be regulated by city ordinance.

(7) FAMILY MEMBER means a spouse, child, parent, any other individual related by blood, or any other individual whose close association to an employee is the equivalent of a family relationship.

(8) MEDIUM OR LARGE EMPLOYER means an employer with more than 15 employees at any time in the preceding 12 months, excluding the employer's family members.

(9) PREDECESSOR means an employer that employs at least one individual covered in this chapter, and for which a controlling interest in such employer or a recognized division of such employer is acquired by a successor.

(10) RELEVANT INFORMATION AND TESTIMONY means only materials, documents, testimony or information necessary to determine whether a violation of this chapter has occurred.

(11) SMALL EMPLOYER means any employer that is not a medium or large employer.

(12) SUBPOENA means a subpoena or a subpoena duces tecum.

(13) SUCCESSOR means an employer that acquires a controlling interest in a predecessor or a controlling interest in a recognized division of a predecessor.

SEC. 20-3. GENERAL AUTHORITY AND DUTY OF THE DIRECTOR.

The director shall implement, administer, and enforce the provisions of this chapter. The director has the power to render interpretations of this chapter and to adopt and enforce rules and regulations supplemental to this chapter as the director deems necessary to clarify the application of this chapter. Such interpretations, rules, and regulations must be in conformity with the purpose of this chapter.

ARTICLE II.
EARNED PAID SICK TIME REQUIREMENTS.

SEC. 20-4. ACCRUAL REQUIREMENTS AND YEARLY CAP.

(a) An employer shall grant an employee one hour of earned paid sick time for every 30 hours worked for the employer in the City of Dallas. Earned paid sick time shall accrue in one hour unit increments, unless an employer's written policies establish the accrual of earned paid sick time to be in fraction of an hour increments.

(b) Earned paid sick time shall accrue starting 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.

(c) This chapter does not require an employer to provide an employee with more earned paid sick time in a year than the yearly cap provided in this section. This chapter does not require an employer to allow an employee to accrue more than the yearly cap of earned paid sick time in a year. An employer may inform an employee that leave requested in excess of the employee's available earned paid sick time will not be paid. The yearly cap for earned paid sick time under this chapter is:

(1) Sixty-four hours per employee per year for medium or large employers, unless the employer chooses a higher limit; and

(2) Forty-eight hours per employee per year for small employers, unless the employer chooses a higher limit;

(d) All available earned paid sick time up to the yearly cap provided in this section shall be carried over to the following year. Provided, that an employer that makes at least the yearly cap of earned paid sick time available to employees at the beginning of the year under the purpose and usage requirements of this chapter is not required to carry over earned paid sick time for that year.

(e) A written contract made pursuant to Title 29, Section 158(d) of the United States Code between an employer and a labor organization representing employees may modify the yearly cap requirement established in this section for employees covered by the contract if the modification is expressly stated in the contract.

(f) A successor must provide to an employee who was employed by a predecessor at the time of the acquisition and hired by the successor at the time of acquisition all earned paid sick time available to the employee immediately before the acquisition.

SEC. 20-5. USAGE REQUIREMENTS.

(a) An employer shall provide an employee with earned paid sick time that meets the requirements of this chapter in an amount up to the employee's available earned paid sick time. The employer shall pay 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.

(b) Earned paid sick time shall be available for an employee to use in accord with this chapter as soon as it is accrued, provided, that an employer may restrict an employee from using earned paid sick time during the employee's first 60 days of employment if the employer establishes that the employee's term of employment is at least one year.

(c) An employee may request earned paid sick time from an employer 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 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.

(d) An employer may adopt reasonable verification procedures to establish that an employee's request for earned paid sick time meets the requirements of this section if an employee requests to use earned paid sick time for more than three consecutive work days. An employer may not adopt verification procedures that would require an employee to explain the nature of the domestic abuse, sexual assault, stalking, illness, injury, health condition, or other health need when making a request for earned paid sick time under this section.

(e) An employer shall provide earned paid sick time for an employee's absence from the employee's scheduled work time if the employee has available earned paid sick time and makes a timely request for the use of earned paid sick time before their scheduled work time. An employer may not prevent an employee from using earned paid sick time for an unforeseen qualified absence that meets the requirements of this section.

(f) This section does not require any employer to allow an employee to use earned paid sick time on more than eight days in a year.

(g) An employee who is rehired by an employer within six months following separation from employment from that employer may use any earned paid sick time available to the employee at the time of the separation.

(h) An employer shall not require an employee to find a replacement to cover the hours of earned paid sick time as a condition of using earned paid sick time. This chapter does not prohibit an employer from allowing an employee to voluntarily exchange hours or voluntarily trade shifts with another employee, or prohibit an employer from establishing incentives for employees to voluntarily exchange hours or voluntarily trade shifts. This chapter does not prohibit an employer from permitting an employee to donate available earned paid sick time to another employee.

(i) Neither 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.

SEC. 20-6. NO CHANGE TO MORE GENEROUS LEAVE POLICIES.

(a) An employer may provide paid leave benefits to its employees that exceed the requirements of this chapter. This chapter does not require an employer who makes paid time off available to an employee under conditions that meet the purpose, accrual, yearly cap, and usage requirements of this chapter to provide additional earned paid sick time to that employee. This chapter does not require an employer to provide additional earned paid sick time to an employee if the employee has used paid time off that meets the requirements of this chapter for a purpose not specified in Section 20-5.

(b) This chapter does not prohibit an employer from granting earned paid sick time to an employee prior to accrual by the employee.

SEC. 20-7. NOTICE AND OTHER REQUIREMENTS.

(a) On 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. This section does not create a new requirement for certified payroll.

(b) An employer who provides an employee handbook to its employees must include a notice of an employee's rights and remedies under this chapter in that handbook.

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(c) An employer who, as a matter of company policy, uses a 12-consecutive-month period other than a calendar year for the purpose of determining an employee's eligibility for and accrual of earned paid sick time shall provide its employees with written notice of such policy at the commencement of employment or by 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.

(d) For the period required for maintenance of records under Title 29, Section 516(a) of the Code of Federal Regulations, an employer shall maintain records establishing the amount of earned paid sick time accrued by, used by, and available to each employee.

(e) An employer shall display a sign describing the requirements of this chapter in a conspicuous place or places where notices to employees are customarily posted. The director shall prescribe the size, content, and posting location of signs required under this section. The signs displayed under this section shall be in English and other languages, as determined by the director. An employer is not required to post such signage until the director makes such signage publicly available on the city's website.

SEC. 20-8. RETALIATION PROHIBITED.

An employer may not transfer, demote, discharge, suspend, reduce hours, or directly threaten such actions against an employee because that employee requests or uses earned paid sick time, reports or attempts to report a violation of this chapter, participates or attempts to participate in an investigation or proceeding under this chapter, or otherwise exercises any rights afforded by this chapter.

ARTICLE III. ENFORCEMENT.

SEC. 20-9. PROCEDURES FOR FILING COMPLAINTS.

Any employee alleging a violation of this chapter or their representative may file a complaint with the director. The director shall receive and investigate complaints, including anonymous complaints, alleging a violation of this chapter. A complaint alleging a violation of this chapter must be filed with the director by or on behalf of an aggrieved employee within two years from the date of the violation.

SEC. 20-10. INVESTIGATION.

(a) Upon filing of a complaint, the director shall commence a prompt and full investigation to determine the facts behind the complaint and whether there is sufficient cause to believe that a violation of this chapter has occurred, except that no investigation may commence if, after reviewing the allegations of the aggrieved employee, the director determines that the complaint does not come within the scope of this chapter. Unless the complaint is filed anonymously, within 15 days after determining that a particular complaint does not come within

the scope of this chapter, the director shall give an employee or their representative a clear and concise explanation of the reasons why it does not and take no further action on the complaint.

(b) The director may issue subpoenas to compel the attendance of a witness or the production of materials or documents in order to obtain relevant information and testimony. Refusal to appear or to produce any document or other evidence after receiving a subpoena pursuant to this section is a violation of this chapter and subject to sanctions as described in Section 2-9 of the Dallas City Code. Before issuing a subpoena, the director shall seek the voluntary cooperation of any employer to timely obtain relevant information and testimony in connection with any investigation of a complaint filed under this chapter.

(c) The director may inform employees at a worksite of any investigation of a complaint at that worksite alleging a violation of this chapter.

SEC. 20-11. VOLUNTARY COMPLIANCE; VIOLATIONS; PENALTIES; APPEALS.

(a) Unless specifically provided otherwise in this chapter, an offense under this chapter is punishable by a civil fine not to exceed $500. Each violation of a particular section or subsection of this chapter constitutes a separate offense. If the director finds after investigation of a timely complaint that a violation of this chapter has occurred, an employer shall receive written notice of the violation and the civil penalty assessed.

(b) The director shall seek voluntary compliance from the employer to remedy any violation of this chapter before any civil penalty is collected. If voluntary compliance is not achieved within 10 business days following the employer's receipt of the written violation notice, the employer shall be liable to the city for the amount of the civil penalty assessed.

(c) No penalties shall be assessed under this chapter until April 1, 2020, except that civil penalties for a violation of Section 20-8, "Retaliation Prohibited," may be assessed at any time after 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. For a violation of this chapter that occurs before April 1, 2020, the director may issue a notice to the employer that a civil penalty may be assessed for a violation that occurs after April 1, 2020.

(d) Employers may appeal any civil penalty assessed under this chapter. The director shall establish and enforce additional rules and regulations and adopt necessary procedures regarding the filing and adjudication of appeals submitted under this section.

(e) This section does not create a criminal offense.

SEC. 20-12. ANNUAL REPORT.

The director may publish an annual report regarding implementation and enforcement of this chapter."

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SECTION 2. That the city manager or his designee shall design and oversee a multilingual public education campaign to inform employers, employees, and city residents of the requirements of this ordinance.

SECTION 3. That any act done or right vested or accrued, or any proceeding, suit, or prosecution had or commenced in any action before the amendment or repeal of any ordinance, or part thereof, shall not be affected or impaired by amendment or repeal of any ordinance, or part thereof, and shall be treated as still remaining in full force and effect for all intents and purposes as if the amended or repealed ordinance, or part thereof, had remained in force.

SECTION 4. That the terms and provisions of this ordinance are severable and are governed by Section 1-4 of Chapter 1 of the Dallas City Code, as amended.

SECTION 5. That Sections 20-1 through 20-12 shall take effect on August 1, 2019, except that Sections 20-1 through 20-12 shall take effect on August 1, 2021 for employers having not more than five employees at any time in the preceding 12 months.

APPROVED AS TO FORM:

CHRISTOPHER J. CASO, Interim City Attorney

By Casey Bruce
Assistant City Attorney

Passed APR 24 2019

PROOF OF PUBLICATION – LEGAL ADVERTISING

The legal advertisement required for the noted ordinance was published in the Dallas Morning News, the official newspaper of the city, as required by law, and the Dallas City Charter, Chapter XVIII, Section 7.

DATE ADOPTED BY CITY COUNCIL APR 24 2019

ORDINANCE NUMBER 31181

DATE PUBLISHED APR 27 2019

ATTESTED BY:

OFFICE OF CITY SECRETARY
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City of Dallas

STATE OF TEXAS §
COUNTY OF DALLAS §
CITY OF DALLAS §

I, **BILIERAE JOHNSON,** City Secretary, of the City of Dallas, Texas, do hereby certify that the attached is a true and correct copy of:

ORDINANCE NO. 31533

Which was passed by the Dallas City Council on **May 13, 2020.**

WITNESS MY HAND AND THE SEAL OF THE CITY OF DALLAS, TEXAS, this the **13th** day of **May, 2020.**

BILIERAE JOHNSON
CITY SECRETARY
CITY OF DALLAS, TEXAS

CITY OF DALLAS TEXAS

Prepared By: **AG**

Exhibit 2

200762

4-10-20

ORDINANCE NO. 31533

An ordinance amending Chapter 2, "Administration," of the Dallas City Code by amending Sections 2-8 and 2-9; providing a process for pre-compliance review of a subpoena; providing a penalty not to exceed $500; providing a saving clause; providing a severability clause; and providing an effective date.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF DALLAS:

SECTION 1. That Section 2-8, "Hearings and Investigations as to City Affairs – Subpoena Powers of Person or Body Conducting Same," of Article I, "In General," of Chapter 2, "Administration," of the Dallas City Code is amended to read as follows:

"**SEC. 2-8. HEARINGS AND INVESTIGATIONS AS TO CITY AFFAIRS - SUBPOENA POWERS OF PERSON OR BODY CONDUCTING SAME.**

In all hearings and investigations that may hereafter be conducted by the city council, the city manager, or any person or committee authorized by either or both of them for the purpose of making investigations as to city affairs, shall for that purpose subpoena witnesses and compel the production of books, papers, and other evidence material to such inquiry in the same manner as is now prescribed by the laws of this state for compelling the attendance of witnesses and production of evidence in the corporation court. A person receiving a subpoena in accordance with this section may, before the return date specified in the subpoena, petition the corporation court for a motion to modify or quash the subpoena. This provision for pre-compliance review applies to all subpoenas, including but not limited to those issued pursuant to Chapters III, XIII, and XVI of the City Charter or Sections 19-9, 20-10, 20A-8, 37-35, 37A-4, 40A-4, 46-10, or 50-3 of this code unless a separate pre-compliance review is provided."

SECTION 2. That Section 2-9, "Same – Penalty for Failure to Testify, Etc.," of Article I, "In General," of Chapter 2, "Administration," of the Dallas City Code is amended to read as follows:

200762

31533

"SEC. 2-9. SAME - PENALTY FOR FAILURE TO TESTIFY, ETC.

Any person who refuses to be sworn or who refuses to appear to testify or who disobeys any lawful order of the city council, the city manager, or any person or committee authorized by either or both of them, fails to file a motion to quash or otherwise demand a pre-compliance review of the subpoena in accordance with Section 2-8, or who fails or refuses to produce any book, paper, document, or instrument touching any matter under examination, or who is guilty of any contemptuous conduct during any of the proceedings of the city council, the city manager, or any person or committee authorized by either or both of them in the matter of such investigation or inquiry after being summoned to give or produce testimony in relation to any matter under investigation, is guilty of an offense.

SECTION 3. That a person violating a provision of this ordinance, upon conviction, is punishable by a fine not to exceed $500.

SECTION 4. That Chapter 2 of the Dallas City Code shall remain in full force and effect, save and except as amended by this ordinance.

SECTION 5. That any act done or right vested or accrued, or any proceeding, suit, or prosecution had or commenced in any action before the amendment or repeal of any ordinance, or part thereof, shall not be affected or impaired by amendment or repeal of any ordinance, or part thereof, and shall be treated as still remaining in full force and effect for all intents and purposes as if the amended or repealed ordinance, or part thereof, had remained in force.

SECTION 6. That the terms and provisions of this ordinance are severable and are governed by Section 1-4 of Chapter 1 of the Dallas City Code, as amended.

SECTION 7. That this ordinance shall take effect immediately from and after its passage and publication in accordance with the provisions of the Charter of the City of Dallas, and it is accordingly so ordained.

APPROVED AS TO FORM:

CHRISTOPHER J. CASO, City Attorney

By Casey Burgess
Assistant City Attorney

Passed MAY 13 2020

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.	§ § § § § § § § § § § § § § § §	CIVIL ACTION NO. 4:19-cv-00570-SDJ

[PROPOSED] ORDER GRANTING DEFENDANTS' MOTION TO DISMISS UNDER RULE 12(b)(1) AND RENEWED MOTION TO DECLINE SUPPLEMENTAL JURISDICTION

The Court, having considered Defendants' Motion to Dismiss Under Rule 12(b)(1) and Renewed Motion to Decline Supplemental Jurisdiction (the "Motion") and Plaintiffs' response, concludes that the motion is well taken and should be granted.

It is therefore ordered that Defendants' Motion is granted, and it is ORDERED as follows:

(1) Count III of the First Amended Complaint for Declaratory and Injunctive Relief is dismissed in its entirety for lack of subject-matter jurisdiction due to mootness; and

(2) The Court declines to exercise supplemental jurisdiction over Count IV of the First Amended Complaint for Declaratory and Injunctive Relief, and therefore, Count IV is dismissed without prejudice to refiling in state court.