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

DEFENDANTS' RESPONSE TO PLAINTIFFS' JOINT MOTION FOR SUMMARY JUDGMENT

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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 response to Plaintiffs' Joint Motion for Summary Judgment (Dkt. No. 66). In support, Defendants would show the Court as follows:

I. RESPONSE TO PLAINTIFFS' STATEMENT OF ISSUES

1. Plaintiffs Hagan and ESI/Employee Solutions ("Employer Plaintiffs") are not entitled to summary judgment on their Fourth Amendment claim because, in addition to the arguments previously articulated by Defendants in their September 30, 2019 motion to dismiss, the Fourth Amendment claim is now moot due to amendments to section 2-8 of the Dallas City Code to specifically set out procedures for pre-compliance review for administrative subpoenas issued by the City.

2. Plaintiffs are not entitled to summary judgment on their preemption claim because the Court should decline to exercise supplemental jurisdiction over the claim and not reach the issue on the merits. Alternatively, the Court can reasonably conclude that the definition of wage as used in the Texas Minimum Wage Act ("TMWA") and the Fair Labor Standards Act ("FLSA") does not include paid sick leave and because the TMWA does not state with unmistakable clarity that the City is preempted from requiring that employers provide a paid sick time benefit.

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); Ex. 2 (Excerpt of Minutes of Apr. 24, 2019 City Council Meeting) at 9, 12-14. During consideration of the agenda item for the Ordinance, ten speakers spoke in favor of the Ordinance, including the director of Dallas County Health and Human Services. *See* Ex. 2 at 12. In addition, during the open microphone session at

the beginning of the City Council meeting, two speakers spoke in favor of the Ordinance and one spoke in opposition to the Ordinance. *Id.* at 11. The City Council enacted the Ordinance as a measure to protect the health, safety, and welfare of the people of the City, specifically finding that denying earned paid sick time to employees is detrimental to the health, safety, and welfare of the residents of the City. Ex. 1 at 1-2; Dallas, Tex., Code § 20-1.

The Ordinance applies to most private employers who 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). Earned sick time begins to accrue when the employee begins employment and is available for use as soon as it is accrued, although the Ordinance permits an employer to restrict use for new employees in specified circumstances. *Id.* § 20-5(b). Earned sick time accrues only for time that an employee performs work within the geographic boundaries of the City. *Id.* § 20-4(a). Once it has accrued, however, earned sick time may be used even if the employee "transfer[s] to a different facility, location, division, or job position with the same employer." *Id.* § 20-5(i).

An employee with earned sick time may request to use that time for absences from work caused by: (1) the employee's illness or injury, medical visits, or a health condition; (2) the employee's need to care for a sick family member or take them for treatment; or (3) the employee's need to seek medical attention, or obtain legal or other relief related to an incident of victimization from domestic abuse, sexual assault, or stalking of the employee or a family member. *Id.* § 20-5(c). The employer must pay the employee's earned 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 not less than the state minimum wage. *Id.* § 20-5(a). Annual caps for an employee's earned sick time are set at sixty-four hours for medium or large employers and forty-eight hours for small employers, as those terms are defined in the Ordinance. *Id.* §§ 20-2(8, 11), 20-4(c). The Ordinance is not intended to add any requirements for employers who already provide paid time off that meets the purpose, accrual, yearly cap, and usage requirements set forth in the Ordinance. *Id.* § 20-6.

Employers are required to post signs advising employees of the Ordinance and their rights and must also include that information in their employee handbook if they have one. *Id.* § 20-7(b, e). Employers are also required to provide each employee a statement showing the amount of earned sick time accrued on at least a monthly basis. *Id.* § 20-7(a). The Dallas Office of Equity and Human Rights (the "Office") was charged with enforcing the Ordinance. *See* https://dallascityhall.com/departments/fairhousing/paid-sick-leave/Pages/default.aspx. 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"). (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. 3 (Ordinance No. 31533).

III. OBJECTIONS TO PLAINTIFFS' SUMMARY JUDGMENT EVIDENCE AND ALTERNATIVE REQUEST FOR ADDITIONAL DISCOVERY UNDER RULE 56(d)

In support of their motion for summary judgment, the only evidence provided by Plaintiffs are the same July 29, 2019 declarations by David F. Bristol and John P. Hagan that were attached to the original complaint filed in this action. The declarations provide estimates of Employer Plaintiffs' costs to comply with the Ordinance but are not supported by any documents setting out the basis for those estimates. Furthermore, despite the fact that the Ordinance had been in effect as to ESI/Employee Solutions, LP ("ESI") for almost eight months before it was enjoined, ESI has not provided any information about any costs actually incurred in connection with compliance with the Ordinance. Without any documentary support or information about costs actually incurred, the information in the declarations as to estimated costs is unsupported, speculative, and self-serving and should be weighed accordingly. *See, e.g.*, *I.V. Servs. Of Am., Inc. v. Trs. Of Am. Consulting*, 136 F.3d 114, 122 (2d Cir.1998) ("[A] finder of fact need not have believed [the] self-serving affidavit."); *Welch v. Liberty Machine Works, Inc.*, 23 F.3d 1430 (8th Cir.1994), *abrogated on other grounds by McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352 (1995) (holding that a self-serving affidavit "alone is insufficient" at summary judgment); *Strum v. Ross*, 11 F. Supp.

2d 942, 946 (S.D. Tex. 1998) (court denied summary judgment where defendants "erroneously relie[d] exclusively on . . . self-serving affidavits"); *Stradley v. Lafourche Commuc'ns, Inc.*, 869 F. Supp 442, 445 (E.D. La. 1994) ("Self-serving affidavits . . . have been held insufficient to sustain motions for summary judgment.").

In addition, neither of the declarations account for the effect of intervening events, including the requirements of the Families First Coronavirus Response Act ("FFCRA") related to paid sick leave and expanded family and medical leave, on the cost estimates provided in July 2019. To the extent that any of the cost estimates would also be incurred to comply with the FFCRA, the information provided in the declarations is incomplete and irrelevant as to any assertion of injury due to the Ordinance.

Defendants specifically object to the following statements in the declarations:

Bristol Declaration

¶ 4: ESI "will be injured by the provisions of the Paid Sick Leave Ordinance." Whether ESI will be injured is a legal conclusion.

¶ 6: ESI "maintains business records that are proprietary and confidential for which it would not want to disclose to the City of Dallas." Whether any business record is proprietary or confidential is a legal conclusion. In addition, the issue of whether ESI wants to disclose its records to the City is irrelevant, as the relevant issue is whether there is a legal basis preventing disclosure in response to an administrative subpoena.

¶ 7: ESI "will have unique and particularized injury . . . ." Whether ESI will be injured and whether such injury is unique and particularized is a legal conclusion.

¶ 7: "Keeping track of how many hours of the day each employee is working within the City . . . will be an enormously costly undertaking . . . ." This statement is speculative and unsupported by any documentary evidence in the record.

¶ 8: "[I]t is contrary to [ESI's] business model to require [it] to provide paid leave to workers . . . ." This statement is unsupported opinion testimony of an interested lay witness.

¶ 9: This paragraph is irrelevant and misleading. For an employee contacted by ESI for a work assignment to be eligible to take eight hours of sick time, that employee would have to work 240 hours or six forty-hour workweeks in the City. Furthermore, ESI's costs for providing an employee to work a vacant position should be covered through their contract with the client.

¶ 10: This paragraph is speculative and misleading because it assumes that each of ESI's over 300 Dallas employees will work forty-eight out of fifty-two weeks in the City per year (assuming a forty-hour workweek) in order to accrue the full amount of paid leave to which they would be entitled under the Ordinance. This contention also conflicts with the contention in paragraph 7 regarding the difficulty in determining whether an employee is working in the City or nearby cities since it assumes that all employees will be working exclusively in the City for the vast majority of each year.

¶¶ 11-13: The cost estimates and statements regarding potential effects of the Ordinance in these paragraphs are speculative and unsupported by any documentary evidence in the record.

Hagan Declaration

¶ 5: Hagan Law Group LLC ("Hagan") maintains business records that are proprietary and confidential for which it would not want to disclose to the City of Dallas." Whether any business record is proprietary or confidential is a legal conclusion. In addition, the issue of whether Hagan

wants to disclose its records to the City is irrelevant, as the relevant issue is whether there is a legal basis preventing disclosure in response to an administrative subpoena.

¶¶ 9-12: The cost estimates and statements regarding potential effects of the Ordinance in these paragraphs are speculative and unsupported by any documentary evidence in the record.

Defendants believe that this case should be dismissed without the burden of additional discovery in accordance with its Motion to Dismiss under Rule 12(b)(1) and Renewed Motion to Decline Supplemental Jurisdiction. Further, given that Plaintiffs have the burden of proof at trial on all of the issues raised in their summary judgment motion, Defendants contend that the bare contentions in the declarations unsupported by any documentary evidence are insufficient to meet Plaintiffs' burden to establish standing and irreparable injury. If, however, the Court denies Defendants' motions and determines that the evidence presented is sufficient to reach the merits of Plaintiffs' Joint Motion for Summary Judgment ("Plaintiffs' Motion"), Defendants request that the Court defer considering Plaintiffs' Motion or deny it pursuant to Rule 56(d) of the Federal Rules of Civil Procedure in order to allow Defendants to conduct discovery regarding Employer Plaintiffs' allegations of injury, as set out in the attached Declaration of Kathleen Fones.

IV. RESPONSE TO PLAINTIFFS' STATEMENT OF UNDISPUTED FACTS

Defendants object to Plaintiffs' statement of undisputed facts to the extent that it sets out legal conclusions rather than facts. In paragraph 1, Plaintiffs state that ESI "will be injured by the provisions of the Ordinance" and that ESI's business records are "proprietary and confidential." Pls' Mot. at 6. Similarly, in paragraph 3, Plaintiffs state that Hagan "will be injured by the provisions of the Ordinance" and that Hagan's business records are "proprietary and confidential." *Id.* at 6-7. Defendants also object to the statement that offering paid sick leave "is contrary to [ESI's] business model" as unsupported opinion testimony of an interested lay witness.

With respect to citations to the Bristol and Hagan declarations, Defendants incorporate by reference their objections to the summary judgment evidence and alternative request for additional discovery under Rule 56(d) of the Federal Rules of Civil Procedure set out in section IV above as if fully set forth herein.

V. ARGUMENT AND AUTHORITIES

A. Applicable Legal Standards

When a party moves for summary judgment on an issue for which it bears the burden of proof, that party "must establish beyond peradventure all of the essential elements of the claim or defense to warrant judgment in [its] favor." *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (1986). Although Plaintiffs cite this standard at one point in their Motion, they also set out the standard under *Celotex Corp. v. Catrett* and subsequent cases shifting the burden to the non-moving party to "establish a genuine issue of material fact as to every essential element of [its] claim . . . ." Pls' Mot. at 8 (citing *Bookman v. Shubzda*, 945 F. Supp. 999, 1004 (N.D. Tex. 1996)). "The *Celotex* standard, however, is appropriate only where, as in that case, the non-moving party bears the burden of proof on the issue that the moving party seeks to have determined through summary judgment." *Mudrick v. Cross Services Inc.*, 200 F. App'x 338, 340 (5th Cir. 2006). Here, Defendants do not have the burden of proof on any of the claims for which Plaintiffs seek summary judgment, and therefore, the *Celotex* standard does not apply.

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," when viewed in the light most favorable to the non-moving party, "show that there is no genuine issue as to any material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). A "dispute about a material fact is 'genuine,' . . . if the evidence is such that a reasonable jury could return a verdict

for the nonmoving party." *Id.* at 248. "The court must draw all reasonable inferences in favor of the non-moving party." *Chaplin v. NationsCredit Corp.*, 307 F.3d 368, 372 (5th Cir. 2002).

B. Employer Plaintiffs Cannot Establish a Facial Claim for a Fourth Amendment Violation as a Matter of Law.

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. As set out in Defendants' September 30, 2019 motion to dismiss (Dkt. No. 36) (the "September Motion"), Employer Plaintiffs' Fourth Amendment challenge to the Ordinance is a facial rather than an as-applied challenge. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Among other reasons, facial challenges are disfavored because they "often rest on speculation" and "raise the risk of premature interpretation of statutes on the basis of factually barebones records." *Wash. St. Grange v. Wash. St. Republican Party*, 552 U.S. 442, 450 (2008) (internal quotation marks omitted). As Defendants have previously argued, Employer Plaintiffs' claim here is based on mere speculation that, because the Ordinance itself does not specifically set out procedures for pre-compliance review, Employer Plaintiffs will not have any opportunity for pre-compliance review if they received a subpoena under the Ordinance. In other words, their claim seems to be that procedures for pre-compliance review must be specifically set out in each law that permits issuance of a subpoena, but this is an unnecessary and burdensome requirement. Instead, there is one section of the Dallas City Code – section 2-8 – that addresses the procedures applicable to *any* subpoena issued by the City. Dallas, Tex., Code § 2-8. Defendants incorporate by reference the arguments in section III.B.5 of Defendants' Response in Opposition to Motion for Preliminary

Injunction (Dkt. No. 12), section III.C.5 of the September Motion (Dkt. No. 36), and section E of their reply to Employer Plaintiffs' response to the September Motion (Dkt. No. 54) as if fully set forth herein.

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* Ex. 3. 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.

As set out in Defendants' Motion to Dismiss Under Rule 12(b)(1) and Renewed Motion to Decline Supplemental Jurisdiction filed concurrently with this motion and incorporated as if fully set forth herein ("Defendants' June Motion"), the amendments render the Fourth Amendment claim moot, requiring it to be dismissed for lack of jurisdiction. 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 "opportunity to question the reasonableness of the

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

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. In their motion for summary judgment, Employer Plaintiffs cite a portion of the Texas Code Construction Act relating to the interpretation of conflicting general and special provisions, which 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 sections 2-8 and 20-10 of the Dallas City Code and that the provisions can easily be construed to give effect to both, it is clear that 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.

In their Motion, Employer Plaintiffs continue to rely on the Supreme Court's decision in *City of Los Angeles v. Patel*, 576 U.S. 409 (2015), as support for their Fourth Amendment claim, Pls' Mot. at 18, but such reliance is misplaced. In that case, plaintiffs were challenging "a provision of the Los Angeles Municipal Code that compels '[e]very operator of a hotel to keep a record' containing specified information concerning guests and to make this record 'available to any officer of the Los Angeles Police Department for inspection' on demand." *Id.* at 412. That

situation is not comparable to the administrative subpoenas at issue here. A subpoena as opposed to a warrant does not require immediate compliance when it is served, and therefore, failure to immediately comply would not subject any employer to be arrested on the spot as was the case with the warrantless searches on demand in *Patel*. *Id.* at 421. In fact, in that case, the Court noted that the parties agreed that the searches "would be constitutional if they were performed pursuant to an administrative subpoena," *id.*, such as the administrative subpoenas at issue here. Given that the City has now addressed and rectified the Court's prior concerns about pre-compliance review for administrative subpoenas, it is clear that any administrative subpoena issued under the Ordinance would be constitutional under *Patel*.

Therefore, Employer Plaintiffs cannot meet their burden of showing beyond peradventure that no set of circumstances exist under which the provision of the Ordinance authorizing the director of the Office to issue administrative subpoenas could be constitutionally valid, and Plaintiffs' Motion must be denied as to Employer Plaintiffs' Fourth Amendment claim.

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 in Defendants' June Motion, 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 of special status as to standing and obtaining a permanent injunction discussed in more detail in sections V.E and V.F below, 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 v. Lampasas Cnty.*, 641 F.3d 155, 159 (5th Cir. 2011); *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 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. Because this Court should not retain supplemental jurisdiction over the state law claim, Plaintiffs' Motion should be denied as to that claim.

D. The Ordinance Is Not Preempted By the Texas Minimum Wage Act.

If this Court determines that it should continue to exercise supplemental jurisdiction over Plaintiffs' state law claim, Plaintiffs' motion for summary judgment as to that claim should be denied. The City is a home-rule municipality, and therefore, it "possess[es] the power of self-government and look[s] to the Legislature not for grants of authority, but only for limitations on [its] authority." *BCCA Appeal Grp., Inc. v. City of Houston*, 496 S.W.3d 1, 7 (Tex. 2016) (citing Tex. Loc. Gov't Code § 51.072(a)); *Dallas Merch.'s & Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 490-91 (Tex. 1993). Furthermore, "the mere fact that the legislature has enacted a law addressing a subject does not mean the complete subject matter is completely preempted." *Dallas Merch.'s & Concessionaire's Ass'n*, 852 S.W.2d at 491. Rather, the legislature's intent to preempt local law must be made with "unmistakable clarity." *Id.* As the Texas Supreme Court has explained, "a general law and a city ordinance will not be held repugnant to each other if any other reasonable construction leaving both in effect can be reached.'" *BCCA Appeal Grp., Inc. v.*

City of Houston, 496 S.W.3d 1, 7 (Tex. 2016) (quoting *City of Beaumont v. Fall*, 291 S.W. 202, 206 (Tex. Com. App. 1927)).

Here, there is undoubtedly a reasonable construction leaving both the TMWA and the Ordinance in effect. While the TMWA-mandated minimum wage admittedly supersedes any other minimum wage established through ordinance, *see* Tex. Lab. Code § 62.0515(a), paid sick leave is not a "wage" as that term is used in the TMWA or the FLSA, which the TMWA incorporates by reference. *See id.* § 62.051.[2] Neither the FLSA nor the TMWA includes paid sick leave as "wages." The TMWA allows "the reasonable cost to the employer of furnishing meals, lodgings, or both to the employee," to be included. *Id.* § 62.053. The FLSA defines "Wage" as including "the reasonable cost . . . to the employer of furnishing [a covered] employee with board, lodging, or other facilities, if such board, lodging or other facilities are customarily furnished by such employer to his employees so long as they are similar to board or lodging." 29 U.S.C. § 203(m)(1); *see also* 29 C.F.R. §§ 531.30-531.32. The definition then explains how an employer should determine the wage to be paid to a tipped employee. 29 U.S.C. § 203(m)(2). There is no discussion of inclusion of vacation leave, holiday leave, sick leave, or any other type of leave in the definition of wages under FLSA. In fact, courts have determined that provision of such fringe benefits in place of overtime wages violate the FLSA. *Dunlop v. Gray-Gato, Inc.*, 528 F.2d 792, 794 (10th Cir. 1976) (finding that agreement by which "no overtime wages would be paid but fringe benefits received instead violates FLSA overtime requirements and such fringe benefits may not be credited against overtime pay required by the [FLSA].").

[2] While the TMWA incorporates the FLSA by reference, it does not incorporate other state statutes such as the Texas Payday Law or the Texas Professional Employer Organization Act. Therefore, any reliance by Plaintiffs on the definition of "wages" in those chapters of the Texas Labor Code is misplaced. The definitions in both statutes are specifically limited to those chapters. *See* Tex. Lab. Code §§ 61.001, 91.001.

The Texas legislature knows how to define wages to include what it intends to include and to exclude what it does not. An examination of other Texas statutes defining wages illuminates the lack of inclusion of vacation leave, holiday leave, sick leave, or any other type of leave in the definition of wages under FLSA. The Texas Payday Law and the Texas Professional Employer Organization Act define wages to include "vacation pay, holiday pay, sick leave pay, [and] parental leave pay," but make no mention of other items included in the definition of wages under the TMWA and FMLA such as the reasonable value of board, rent, housing, lodging, payments in kind, and tips. *See* Tex. Lab. Code §§ 61.001(7), 91.001(17). The TMWA does exactly the opposite of the Texas Payday Law and the Texas Professional Employer Act. It specifically includes "the reasonable cost to the employer of furnishing meals, lodgings, or both to the employee" as part of the wages covered by the act but does not include vacation pay, holiday pay, sick leave pay, or parental leave pay. *Id.* § 62.053. The narrower definition of wages in the TMWA makes sense in the context because it comports with the definition of wages in the FLSA itself. 29 U.S.C. § 203(m)(1). If the Texas legislature intended for wages under the TMWA to include leave pay, it could have included it in the definition, but it did not. Because the Texas legislature did not define wages to include sick leave pay in the TMWA, a reasonable construction is that sick leave pay is not a "wage" as defined in that statute.

Because the Court can reasonably conclude that the definition of wage as used in the TMWA and FLSA does not include fringe benefits such as paid sick leave and because the TMWA does not state with unmistakable clarity that the City is preempted from requiring that employers provide a paid sick time benefit, Plaintiffs have not "establish[ed] beyond peradventure *all* of the essential elements . . . to warrant judgment in [their] favor." *Chaplin*, 307 F.3d at 372 (emphasis in original).

E. Plaintiffs Have Not Established Standing Beyond Peradventure.

In order to establish standing under Article III of the Constitution, there are three requirements. First, the plaintiff must have suffered an "injury in fact." The injury must be an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Second, the injury must be fairly traceable to the defendants' conduct. *Id*. Thus, there must be a causal connection between the injury and the defendant's conduct and the alleged injury cannot be caused by the independent action of some third party not before the court. *Id*. Third, it must be likely, not speculative, that the injury will be redressed by a favorable decision of the court. *Id*.

"Since [these elements] are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.* at 561. When a plaintiff is responding to a summary judgment motion, "the plaintiff can no longer rest on . . . 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,' Fed. Rule Civ. Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true." *Id.* Here, however, Plaintiffs are not responding to summary judgment but are affirmatively seeking summary judgment themselves. In such circumstances, inferences are to be drawn in favor of Defendants as the non-moving party, and Plaintiffs "must establish beyond peradventure *all* of the essential elements of the claim or defense to warrant judgment in [its] favor." *Chaplin*, 307 F.3d at 372 (emphasis in original). Therefore, Plaintiffs here cannot merely rest on the same unsupported contentions regarding injury that they pled in their complaint. Instead, the applicable standard should be closer to that of the final stage set out in *Lujan*. That is, the facts should be supported adequately by the

evidence to support a judgment in favor of Plaintiffs. *Lujan*, 504 U.S. at 561. Here, Plaintiffs seek summary judgment based on the same unsupported declarations that were submitted with their original complaint, but when Plaintiffs seek summary judgment, these statements unsupported by any evidence are insufficient to establish standing.

First, as discussed in section V.B above and Defendants' June Motion filed concurrently with this motion, Employer Plaintiffs' Fourth Amendment claim is now moot. Notably, this is the only remaining claim for which this Court could have original jurisdiction under Article III. Because Employer Plaintiffs' Fourth Amendment claim was a facial rather than an as-applied challenge to the Ordinance, Employer Plaintiffs have not established and cannot establish as a matter of law that they ever suffered any actual injury from the Ordinance with respect to the claimed violation of their Fourth Amendment rights. They also cannot establish an imminent injury. "Allegations of possible future injury do not satisfy the requirements of Art[icle] III. A threatened injury must be 'certainly impending' to constitute injury in fact." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). Given that the City's ordinances provide for constitutionally adequate pre-compliance review of any administrative subpoena that might be issued to Employer Plaintiffs, there is no certainly impending Fourth Amendment injury due to the Ordinance. For these reasons, Employer Plaintiffs cannot establish an injury in fact as to their Fourth Amendment claim. In addition, as discussed above and in Defendants' June Motion, any claim Employer Plaintiffs may have had has already been fully redressed by the City's amendment of section 2-8 of the Dallas City Code, and therefore, there is no longer any relief that this Court could provide to redress Employer Plaintiffs' alleged injury related to their Fourth Amendment claim.

Second, as discussed in section III above, in support of their assertions of standing, Employer Plaintiffs have provided the same affidavits from July 2019. The declarations provide

estimates of Employer Plaintiffs' costs to comply with the Ordinance but are not supported by any documents setting out the basis for those estimates. Furthermore, they provide no information about any costs actually incurred in connection with compliance with the Ordinance, even though the Ordinance was in effect from August 1, 2019 until it was enjoined on March 30, 2020. These barebones declarations are insufficient to establish injury-in-fact for the purposes of a judgment in favor of Employer Plaintiffs. *See, e.g.*, *I.V. Servs. Of Am.*, 136 F.3d at 122 ("[A] finder of fact need not have believed [the] self-serving affidavit."); *Welch*, 23 F.3d 1430, *abrogated on other grounds by McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352 (1995) (holding that a self-serving affidavit "alone is insufficient" at summary judgment); *Strum*, 11 F. Supp. at 946 (court denied summary judgment where defendants "erroneously relie[d] exclusively on . . . self-serving affidavits"); *Stradley*, 869 F. Supp at 445 ("Self-serving affidavits . . . have been held insufficient to sustain motions for summary judgment.").

In addition, neither declaration makes any mention of the effect of FFCRA requirements on the cost estimates provided in July 2019. To the extent any of the cost estimates would also be incurred to comply with the FFCRA, the injury alleged is not traceable to the Ordinance but would be incurred to comply with the FFCRA regardless of the requirements of the Ordinance. In addition, the injuries would not be redressed by any decision of this Court since they would still be incurred even if the Ordinance is declared unconstitutional or permanently enjoined.

As to the State, it has never even claimed to have standing as to any claim over which this Court has original jurisdiction, only the state law claim over which the Court is exercising supplemental jurisdiction. Here, there is no case or controversy under Article III giving the State standing to bring a claim in federal court independently of Employer Plaintiffs. All of the cases cited by the State in support of its standing relate to standing to bring claims for which federal

courts have original jurisdiction under Article III. *See* Pls' Mot. at 15-16. In particular, the State cites two cases that it alleges "recognize[] States' special rights to seek relief in federal courts." *Id.* (citing *In re Gee*, 941 F.3d 153, 167 (5th Cir. 2019); *see also Massachusetts v. EPA*, 549 U.S. 497, 520 (2007)). Nothing in either case cited by the State, however, gives it a special right to seek relief in federal court where there is no basis for original jurisdiction under Article III.

For these reasons, Plaintiffs have not established standing with the manner and degree of evidence required to grant their motion for summary judgment.

F. Plaintiffs Have Not Met the Requirements for a Permanent Injunction.

In order to obtain permanent injunctive relief, a party 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 Dallas*, 460 F.3d 607, 611 (5th Cir. 2016)). "An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 32 (2008); *see also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) ("[A] federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law"). "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Romero-Barcelo*, 456 U.S. at 312.

As discussed above, Plaintiffs have not established success on the merits. In addition, as discussed above, Employer Plaintiffs have not provided any evidence to support their original contentions and estimates regarding alleged injury but instead rely merely on unsupported contentions in two declarations. Just as this evidence is insufficient to establish the injury-in-fact element for standing, it is insufficient to establish irreparable injury.

As to the other two elements, Plaintiffs essentially argue that, because they should win on the merits, their injury outweighs any damage to Defendants and is in the public interest. That argument contradicts *Winter* by asserting that an injunction should follow from success on the merits as a matter of course. This is even more blatant with respect to the State since it also argues that success on the merits of the preemption claim is all that is necessary to show irreparable injury to its sovereignty. These arguments turn the extraordinary remedy of an injunction into a remedy that should be routinely granted as a matter of course whenever the State asserts that a local law conflicts with a state law, but that is simply not the standard for granting an injunction.

Finally, it is clear that the public interest is disserved by enjoining the Ordinance. First, Plaintiffs wrongly assert that, "[g]iven 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 . . ." Pls' Mot. at 24. To the contrary, the Ordinance had been in effect for almost eight months before it was enjoined. During those months, employees in the City were accruing earned sick time. The fact that the preliminary injunction was entered days before the City was set to begin *enforcing* the Ordinance does not alter the fact that employees lost access to eight months of accrued benefits when the Ordinance was enjoined.

More importantly, the Ordinance serves a public interest by protecting the health, safety, and welfare of the people of the City because denial of earned paid sick time to employees is detrimental to the health, safety, and welfare of the residents of the City. At the public hearing prior to the passage of the Ordinance on April 24, 2019, ten speakers spoke in favor of the Ordinance, including the director of Dallas County Health and Human Services. *See* Ex. 2 at 12. In addition, two speakers spoke in favor of the Ordinance and one in opposition during the open

microphone session at the beginning of the April 24, 2019 meeting. *Id.* at 11. Video of the meeting is available at https://dallastx.swagit.com/play/04242019-1099 (Item 46).

These speakers spoke on a variety of topics, including the role of paid sick leave in reducing the spread of illness in the workplace and to customers in industries like food service. This testimony comports with multiple public health studies released before the enactment of the Ordinance on the importance of paid sick leave in reducing the spread of disease. *See, e.g.*, Daniel Kim, *Paid Sick Leave and Risks of All-Cause and Cause-Specific Mortality Among Adult Workers in the USA*, 14 Int'l J. Envtl. Res. & Pub. Health 1247 (2017); Soumitra S. Bhuyan et al., *Paid Sick Leave Is Associated with Fewer ED Visits Among US Private Sector Working Adults*, 34 Am. J. Emergency Med. 784 (2016); LeaAnne DeRigne et al., *Workers Without Paid Sick Leave Less Likely to Take Time Off for Illness or Injury Compared to Those with Paid Sick Leave*, 35 Health Aff., no.3, Mar. 2016 at 520-27; Supriya Kumar et al., *Policies to Reduce Influenza in the Workplace: Impact Assessments Using an Agent-Based Model*, 103 Am. J. Pub. Health 1406 (2013); Supriya Kumar et al., *The Impact of Workplace Policies and Other Social Factors on Self-Reported Influenza-Like Illness Incidence during the 2009 H1N1 Pandemic*, 102 Am. J. Pub. Health 134 (2012); Steven Sumner et al., *Factors Associated with Food Workers Working while Experiencing Vomiting or Diarrhea*, 74 J. Food Protection 215 (2011). Enjoining the Ordinance will disserve the public interest by eliminating an important tool to equalize access to paid sick time to workers across the City and to improve the health, safety, and welfare of workers and residents of the City.

Recent events have only strengthened Defendants' position that the Ordinance is in the public interest. The federal government by enacting FFCRA has recognized the importance of providing paid sick leave in an attempt to slow the spread of COVID-19. As businesses in Texas

reopen and the number of confirmed cases of COVID-19 in the City and the State continue to rise, paid sick leave is even more essential to the public interest now than it was when the Ordinance was enacted in April 2019. Studies have shown that sick employees are "1.5 times more likely to go to work when they lack strong paid leave guarantees." Press Release, UCLA Fielding School of Public Health, Paid Sick Leave a Crucial Weapon During COVID-19 Era and Beyond, UCLA Study Finds (May 7, 2020), *available at* https://www.newswise.com/coronavirus/paid-sick-leave-a-crucial-weapon-during-covid-19-era-and-beyond-ucla-study-finds. Furthermore, the current public health crisis has highlighted gender, racial, and economic inequities in paid leave policies around the United States. *See, e.g.*, Usha Ranji et al., *Coronavirus Puts a Spotlight on Paid Leave Policies* (Apr. 2, 2020), Kaiser Family Foundation, *available at* https://www.kff.org/coronavirus-covid-19/issue-brief/coronavirus-puts-a-spotlight-on-paid-leave-policies. Now more than ever, paid leave policies like the Ordinance that attempt to resolve these inequities and provide assurances to employees that they can stay home from work when they are sick are essential public health tools. Therefore, a permanent injunction of the Ordinance unquestionably disserves the public interest.

For these reasons, Plaintiffs' request for a permanent injunction preventing the City from enforcing the Ordinance should be denied.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that Plaintiffs' Joint Motion for Summary Judgment be denied in its entirety and that the Court grant Defendants such other relief as the Court finds just.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANTS

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. Discovery in this matter is currently scheduled to close on August 17, 2020.

4. In order to minimize the costs and burdens of discovery, Defendants did not seek discovery while their motion to dismiss was pending.

5. On March 30, 2020, Defendants' motion to dismiss was granted in part and denied in part.

6. At that time, the below signed lead counsel was on maternity leave and returned from leave on April 27, 2020. Plaintiffs' motion for summary judgment was filed less than two weeks later.

7. In addition, the COVID-19 pandemic has created logistical difficulties in pursuing discovery and has caused staffing and resource issues at the Dallas City Attorney's Office. The section of the Dallas City Attorney's Office in which defense counsel work recently lost an attorney who could not be replaced due to a hiring freeze, which has resulted in a redistribution of work in the section. The section also has faced an increased workload due to litigation by and against the City relating to COVID-19 issues and issues arising from protests relating to policing.

8. As stated in section III of Defendants' Combined Motion to Dismiss under Rule 12(b)(1), Renewed Motion to Decline Supplemental Jurisdiction, and Response to Plaintiffs' Joint Motion for Summary Judgment, Defendants believe that this case should be dismissed without the burden of additional discovery in accordance with its Motion to Dismiss under Rule 12(b)(1) and Renewed Motion to Decline Supplemental Jurisdiction.

9. If, however, the Court determines that it is appropriate to reach the merits of the issues raised in Plaintiffs' Joint Motion for Summary Judgment (the "Motion"), Defendants request that the Court defer decision on the Motion to allow time to take additional discovery as to Employer Plaintiffs' alleged injury. Defendants' requested discovery would include document requests and interrogatories to discover the basis of the estimated costs for compliance with the

Ordinance, information about any costs actually incurred to comply with the Ordinance during the eight months it was in effect, and information about any costs incurred to provide leave under the Families First Coronavirus Response Act. In addition, Defendants may seek depositions of David Brisol, John Hagan, or other employees or corporate representatives of Employer Plaintiffs regarding the same issues.

10. 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.

11. Exhibit 2 to this declaration is a true and correct excerpt of a certified copy of the Dallas City Council Meeting Minutes, obtained from the Office of the City Secretary, for the meeting that took place on April 24, 2019 when Ordinance No. 31181 was enacted.

12. Exhibit 3 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

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."

31181

190618

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 Russell
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
M:\SCANS\ScanPro Users\ScanPro - Anna\my stuff\my stuff\PROOF OF PUBLICATION.docx

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 the Minutes for:

Dallas City Council Minutes
April 24, 2019
City Council Meeting

filed in my office as official records of the City of Dallas, and that I have custody and control of said records.

WITNESS MY HAND AND THE SEAL OF THE CITY OF DALLAS, TEXAS, this the **29th** day of **August, 2019.**

BILIERAE JOHNSON
CITY SECRETARY
CITY OF DALLAS, TEXAS

CITY OF DALLAS TEXAS

PREPARED BY: LJ

Exhibit 2

190570

2019 APR 22 AM 9:12

CITY SECRETARY
DALLAS, TEXAS

Memorandum

CITY OF DALLAS

Date: April 22, 2019

To: Bilierae Johnson
City Secretary's Office

Subject: April 24, 2019 City Council Agenda

Attached are the Agenda and Addendum Certification documents for the above referenced meeting.

Should there be any questions or concerns, please let me know as soon as possible.

Thanks!

Abigail Medlyn

Vhee Anastacio
City Agenda Coordinator

Attachments

190570

APRIL 24, 2019 CITY COUNCIL AGENDA
CERTIFICATION

This certification is given pursuant to Chapter XI, Section 9 of the City Charter for the City Council Agenda dated April 24, 2019. We hereby certify, as to those contracts, agreements, or other obligations on this Agenda authorized by the City Council for which expenditures of money by the City are required, that all of the money required for those contracts, agreements, and other obligations is in the City treasury to the credit of the fund or funds from which the money is to be drawn, as required and permitted by the City Charter, and that the money is not appropriated for any other purpose.

T.C. Broadnax
City Manager

4/12/19
Date

Elizabeth Reich
Chief Financial Officer
for

4/12/19
Date

190570

APRIL 24, 2019 CITY COUNCIL ADDENDUM
CERTIFICATION

This certification is given pursuant to Chapter XI, Section 9 of the City Charter for the City Council Addendum dated April 24, 2019. We hereby certify, as to those contracts, agreements, or other obligations on this Agenda authorized by the City Council for which expenditures of money by the City are required, that all of the money required for those contracts, agreements, and other obligations is in the City treasury to the credit of the fund or funds from which the money is to be drawn, as required and permitted by the City Charter, and that the money is not appropriated for any other purpose.

T.C. Broadnax
City Manager

4/19/2019
Date

M Elizabeth Reich
Elizabeth Reich
Chief Financial Officer

4-19-19
Date

MINUTES OF THE DALLAS CITY COUNCIL
WEDNESDAY, APRIL 24, 2019

19-0570

VOTING AGENDA MEETING
CITY COUNCIL CHAMBER, CITY HALL
MAYOR MICHAEL S. RAWLINGS, PRESIDING

PRESENT: [15] Rawlings, Thomas (*2:22 p.m.), Medrano (*9:22 a.m.), Griggs (*9:32 a.m.), Arnold, Callahan, Narvaez (*9:20 a.m.), Felder, Atkins, Clayton (*9:25 a.m.), McGough, Kleinman, Greyson (*9:24 a.m.), Gates, Kingston

ABSENT: [0]

The meeting was called to order at 9:15 a.m. with a quorum of the city council present.

The invocation was given by Co-Pastor and Executive Director Rachel Triska of Life in Deep Ellum.

Councilmember Arnold led the pledge of allegiance.

The meeting agenda, posted in accordance with Chapter 551, "OPEN MEETINGS," of the Texas Government Code, was presented.

The meeting recessed at 12:38 p.m. and reconvened to open session at 2:18 p.m. [*Thomas (2:22 p.m.), *Arnold (2:19 p.m.), *Callahan (2:21 p.m.), *McGough (2:19 p.m.), *Greyson (2:20 p.m.), *Gates (2:20 p.m.)]

After all business properly brought before the city council had been considered, the city council adjourned at 3:25 p.m.

Mayor

ATTEST:

City Secretary

MAY - 8 2019
Date Approved

The annotated agenda is attached to the minutes of this meeting as EXHIBIT A.

The actions taken on each matter considered by the city council are attached to the minutes of this meeting as EXHIBIT B.

Ordinances, resolutions, reports and other records pertaining to matters considered by the city council, are filed with the City Secretary as official public records and comprise EXHIBIT C to the minutes of this meeting.

* **Indicates arrival time after meeting called to order/reconvened**

EXHIBIT A

City of Dallas

1500 Marilla Street
Dallas, Texas 75201

COUNCIL ANNOTATED AGENDA

April 24, 2019

9:15 A.M. – 3:25 P.M.

[19-0570; HELD]

Invocation and Pledge of Allegiance (Council Chambers)

Agenda Item/Open Microphone Speakers
[19-0571]

VOTING AGENDA

1. 19-524 Approval of Minutes of the April 10, 2019 City Council Meeting
[19-0572; APPROVED]

CONSENT AGENDA
[19-0573; APPROVED]

Building Services Department

2. 19-336 Authorize **(1)** an increase to the construction services contract with Phoenix 1 Restoration and Construction, Ltd. to increase the scope of work for construction modifications and corrective actions for hidden conditions discovered during the construction phase for the Dallas City News Studio in Fair Park located at 1620 First Avenue; and **(2)** an increase in appropriations in an amount not to exceed $379,692.00 in the Public Educational and Governmental Access Fund - Not to exceed $347,828.01, from $6,027,471.36 to $6,375,299.37 - Financing: Public Educational and Governmental Access Fund
[19-0574; APPROVED]

City Attorney's Office

3. 19-485 Authorize settlement of the lawsuit styled Angelina Tinnion v. City of Dallas, Cause No. DC-18-06974 - Not to exceed $50,000.00 - Financing: Risk Management Funds
[19-0575; APPROVED]

4. 19-477 Authorize a professional services contract with Gilbert Wilburn, PLLC, to provide legal services and representation to the City of Dallas in connection with matters involving future and ongoing water utility matters before the Public Utility Commission of Texas, the Texas Commission on Environmental Quality, the State Office of Administrative Hearings, and other water utility-related matters - Not to exceed $200,000.00 - Financing: Dallas Water Utilities Fund
[19-0576; APPROVED]

5. 19-503 Authorize Supplemental Agreement No. 1 to the professional services contract with Carter Arnett PLLC, for additional legal services in connection with the lawsuit styled Michael J. Bostic v. City of Dallas, Cause No. DC-18-08325 - Not to exceed $50,000.00, from $50,000.00 to $100,000.00 - Financing: Risk Management Funds
[19-0577; APPROVED]

ITEMS FOR INDIVIDUAL CONSIDERATION (continued)

Department of Sustainable Development and Construction (continued)

Note: Agenda Item Nos. 45 and 63 must be considered collectively.

45. 19-518 An ordinance granting a revocable license to AT&T Services, Inc., for the use of a total of approximately 336 square feet of aerial space to occupy, maintain, and utilize a media panel over a portion of Jackson and Akard Streets rights-of-way, near its intersection with Akard Street - Revenue: $1,894.00 annual fee, plus the $20.00 ordinance publication fee
[19-0617; APPROVED; ORDINANCE 31180]

Mayor and City Council Office

46. 19-479 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; **(1)** providing definitions; **(2)** providing that employers must provide one hour of earned paid sick time for every 30 hours of time worked with a yearly cap 64 hours of paid sick time per employee for medium or large employers and a yearly cap of 48 hours of paid sick time per employee for small employers; **(3)** providing that employees must be able to carry over unused paid sick time to the following year; **(4)** providing procedures for an employee to request earned paid sick time off; **(5)** providing that an employer may not retaliate against an employee for using earned paid sick time or for making a complaint to the director; **(6)** providing a complaint process for employees to the director; **(7)** providing an investigation process; **(8)** providing a civil penalty not to exceed $500.00; **(9)** providing for an appeal of a city penalty; **(10)** providing a savings clause; **(11)** providing a severability clause; and **(12)** providing an effective date - Financing: No cost consideration to the City (via Councilmembers Kingston, Narvaez, Griggs, Deputy Mayor Pro Tem Medrano, and Felder)
[19-0618; APPROVED; ORDINANCE 31181]

EXHIBIT B

OFFICIAL ACTION OF THE DALLAS CITY COUNCIL

APRIL 24, 2019

19-0571

CITIZEN SPEAKERS

In accordance with the City Council Rules of Procedure, the city council provided "open microphone" opportunities for the following individuals to comment on matters that were scheduled on the city council voting agenda or to present concerns or address issues that were not matters for consideration listed on the posted meeting agenda:

OPEN MICROPHONE – BEGINNING OF MEETING:

SPEAKER:	Richard Sheridan, 4801 Live Oak St. (handout provided)
SUBJECT:	Churches and our homeless
SPEAKER:	Judy Bryant, 6900 Skillman St.
SUBJECT:	Earned paid sick time
REPRESENTING:	Texas Alliance for Retired Americans
SPEAKER:	Mark York, 722 N. Hampton Rd.
SUBJECT:	Paid sick time
REPRESENTING:	Dallas AFL-CIO
SPEAKER:	Susan Fountain, 10630 Chesterton Dr.
SUBJECT:	Paid sick leave policy
SPEAKER:	Sandra Crenshaw, 1917 S. Malcolm X Blvd.
SUBJECT:	The car wash

ADDITIONAL – OPEN MICROPHONE:

There were no speakers under this category.

OPEN MICROPHONE – END OF MEETING:

SPEAKER:	Daniel Moore, 4236 Lawnview Ave. (visual presentation)
SUBJECT:	Code enforcement
SPEAKER:	Deloris Phillips, Address Not Provided
SUBJECT:	Corruption, collusion & cover-up

OFFICIAL ACTION OF THE DALLAS CITY COUNCIL

APRIL 24, 2019

19-0618

Item 46: 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; **(1)** providing definitions; **(2)** providing that employers must provide one hour of earned paid sick time for every 30 hours of time worked with a yearly cap 64 hours of paid sick time per employee for medium or large employers and a yearly cap of 48 hours of paid sick time per employee for small employers; **(3)** providing that employees must be able to carry over unused paid sick time to the following year; **(4)** providing procedures for an employee to request earned paid sick time off; **(5)** providing that an employer may not retaliate against an employee for using earned paid sick time or for making a complaint to the director; **(6)** providing a complaint process for employees to the director; **(7)** providing an investigation process; **(8)** providing a civil penalty not to exceed $500.00; **(9)** providing for an appeal of a city penalty; **(10)** providing a savings clause; **(11)** providing a severability clause; and **(12)** providing an effective date - Financing: No cost consideration to the City (via Councilmembers Kingston, Narvaez, Griggs, Deputy Mayor Pro Tem Medrano, and Felder)

The following individuals addressed the city council on the item:

Julio Acosta, 1111 W. Mockingbird Ln.
Philip Huang, 2377 N. Stemmons Fwy., representing Dallas County Health and Human Services
David Zuniga, 3102 Lenway St.
Kali Cohn, 4221 Cole Ave.
Tom Ervin, 5439 McCommas Blvd.
Domonique Givens, 4590 W. Kiest Blvd., representing Texas Organizing Project
Edwin Robinson, 320 Singleton Blvd., representing Dallas Black Clergy
Michael Waters, 3203 Holmes St., representing Dallas Black Clergy
Kamyon Conner, 2112 Preston Pl., Denton, TX, representing Texas Equal Access Fund
Karrol Rimal, Address Not Provided

Councilmember Kingston moved to adopt the item.

Motion seconded by Deputy Mayor Pro Tem Medrano.

During discussion, Councilmember Callahan moved a substitute motion to defer the item to the June 12, 2019 voting agenda meeting of the city council.

Substitute motion seconded by Councilmember Kleinman.

During further discussion and at the request of Councilmember Atkins, the following individual addressed the city council on the item:

Diane Ragsdale, 4907 Spring Ave., representing Innercity Community Development Corporation (ICDC)

After discussion, Mayor Rawlings called a record vote on Councilmember Callahan's substitute motion:

Voting Yes:	[5]	Rawlings, Callahan, McGough, Kleinman, Gates
Voting No:	[9]	Medrano, Griggs, Arnold, Narvaez, Felder, Atkins, Clayton, Greyson, Kingston
Absent when vote taken:	[1]	Thomas

The city secretary declared the motion failed.

Councilmember McGough moved the following substitute motion:

WHEREAS, Working Texans for Paid Sick Time reports that over 40 percent of employees in Texas lack employer-paid sick leave;

WHEREAS, when employees without employer-paid sick leave miss work due to an illness, they may lose pay and risk losing their jobs;

WHEREAS, lack of employer-paid sick leave means that many employees may work while they are sick, may not recover as quickly from their illness, and may be less productive at work; and

WHEREAS, because of the concerns with the health, safety, and welfare of its citizens, the City Council wishes to understand the effects of unpaid sick leave on Dallas citizens by collecting data on employers in the City who do not provide paid sick leave.

Now, Therefore,

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

SECTION 1. That the City Manager is instructed to implement a data collection process and database to receive and track information and complaints from phone lines, an interactive and updated website, and other appropriate reporting methods relating to businesses who are not paying sick leave.

SECTION 2. That the City Manager is instructed to create a process where employers reported for not offering or paying sick leave will be contacted and offered the opportunity to explain their process and state reasons why paid sick leave is not offered.

SECTION 3. That the City Manager is instructed to report the findings on unpaid sick leave to the City days of passage of this resolution and maintain an updated repository of, publicly available information through the website

SECTION 4. That this resolution shall take effect immediately from and after its passage in accordance with the Charter of the City of Dallas, and it is accordingly so resolved

Substitute motion seconded by Councilmember Kleinman.

After discussion, Mayor Rawlings called a record vote on Councilmember McGough's substitute motion:

Voting Yes:	[5]	Rawlings, Callahan, McGough, Kleinman, Gates
Voting No:	[9]	Medrano, Griggs, Arnold, Narvaez, Felder, Atkins, Clayton, Greyson, Kingston
Absent when vote taken:	[1]	Thomas

The city secretary declared the motion failed.

Mayor Rawlings called a record vote on Councilmember Kingston's original motion to adopt the item:

Voting Yes:	[10]	Medrano, Griggs, Arnold, Callahan, Narvaez, Felder, Atkins, Clayton, Greyson, Kingston
Voting No:	[4]	Rawlings, McGough, Kleinman, Gates
Absent when vote taken:	[1]	Thomas

The city secretary declared the item adopted.

Assigned ORDINANCE NO. 31181

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 3

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 DENYING PLAINTIFFS' JOINT MOTION FOR SUMMARY JUDGMENT

The Court, having considered Plaintiffs' Joint Motion for Summary Judgment and Defendants' response, concludes that the motion is not well taken and should be denied.

It is therefore ordered that Plaintiffs' Joint Motion for Summary Judgment is DENIED in all things.