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.	§	NO. 4:19-CV-00570-SDJ
CITY OF DALLAS; T.C. BROADNAX, in his official capacity as City Manager of the City of Dallas; and BEVERLY DAVIS, in her official capacity as Director of the City of Dallas Office of Equity and Human Rights, ***Defendants.***	§	

PLAINTIFFS' JOINT RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS UNDER RULE 12(b)1), RENEWED MOTION TO DECLINE SUPPLEMENTAL JURISDICTION

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TO THE HONORABLE SEAN D. JORDAN:

Plaintiffs ESI/Employee Solutions, LP ("ESI"), Hagan Law Group LLC ("Hagan") (collectively, the "Employer Plaintiffs"), and the State of Texas (collectively, with the Employer Plaintiffs, "Plaintiffs") jointly file this Memorandum in Opposition to respond to the City of Dallas's (the "City") motion to dismiss and renewed motion to decline supplemental jurisdiction in the challenge to the City's ordinance mandating that employers provide their employees with paid sick leave (the "Ordinance"). (Dkt. #69).

RESPONSE TO MOVANTS' STATEMENT OF ISSUES

1. Employer Plaintiffs' Fourth Amendment claim is not moot because the City's amendments to the Dallas City Code do not resolve the constitutional problems with the Ordinance's subpoena provision.

2. Because the federal Fourth Amendment claim is not moot, there is no changed circumstance that should lead the Court to reverse its previous decision to exercise supplemental jurisdiction over Plaintiffs' state law claim that the Ordinance is preempted by the Texas Minimum Wage Act.

3. Even if the Court were to find the federal Fourth Amendment claim were moot, it should exercise supplemental jurisdiction and proceed to rule on Plaintiffs' state law claim that the Ordinance is preempted by the Texas Minimum Wage Act.

STATEMENT OF FACTS

After the Court's March 30, 2020 Memorandum Opinion & Order granting in part and denying in part the City's motion to dismiss and granting Plaintiffs' motion

for preliminary injunction (the "Memorandum Opinion"), (Dkt. #64), two claims remain in this action: (1) a federal Fourth Amendment claim by the Employer Plaintiffs challenging the Ordinance's subpoena provision on the basis that it does not provide the required pre-compliance review before a court; and (2) a supplemental state law claim by all Plaintiffs that the Ordinance is preempted by the Texas Minimum Wage Act. The Memorandum Opinion denied the City's motion to dismiss the Fourth Amendment claim, thoroughly examining the textual provisions at issue and explaining why they were constitutionally inadequate. (Dkt. #64 at 30-38). The Court also granted a preliminary injunction against enforcement of the Ordinance on the basis that it was preempted by the Texas Minimum Wage Act (finding no need to also grant it on the basis of the federal Fourth Amendment claim). (Dkt. #64 at 46-61).

As this Court stated in its recent Memorandum Opinion, "[t]his case involves a facial challenge to the constitutionality of the Ordinance [and] the parties agree that the subject matter [of this case] lends itself to having little evidence to present," as "[t]he questions before the Court in this case are predominantly legal in nature. . . . and the parties have likewise 'point[ed] to no physical evidence that may be required to resolve the case.'" (Dkt. #64 at 42-43 (quoting Dkt. #49)). Agreeing with this, Plaintiffs filed their Joint Motion for Summary Judgment on May 7, 2020 on both of the remaining claims. (Dkt. #66).

After the Court's Memorandum Opinion and Plaintiffs' Joint Motion for Summary Judgment were filed, the City amended the Dallas City Code relating to

subpoenas in an attempt to knock out Employer Plaintiffs' federal Fourth Amendment claim. (Dkt. #69 at Ex. 2). The City apparently hoped that this would moot that claim and lead the Court to decline to exercise its supplemental jurisdiction over the state law claim that the Ordinance is preempted by the Texas Minimum Wage Act.

STANDARD OF REVIEW

"When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (citing *Hitt v. City of Pasadena*, 561 F.2d 606, 608 (5th Cir. 1977)). Challenges to subject matter jurisdiction under Rule 12(b)(1) may be "facial" or "factual." Facial attacks contest the sufficiency of the pleadings, and the trial court must accept the complaint's allegations as true. *See Ass'n of Am. Physicians & Surgeons, Inc. v. Tex. Med. Bd.*, 627 F.3d 547, 553 (5th Cir. 2010). A factual attack is made when "the defendant submits affidavits, testimony, or other evidentiary materials." *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981). Although the plaintiff bears the burden of proof in the Rule 12(b)(1) context, a court should grant the motion "only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief." *Ramming*, 281 F.3d at 161 (citing *Home Builders Ass'n v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998)). While a "plaintiff bears the burden to prove that the Court has jurisdiction, [] when a defendant asserts mootness [it] retain[s] such a burden to establish

mootness when [it] voluntarily cease[s] the conduct that the plaintiff is challenging." *Kovac v. Wray*, No. 3:18-cv-00110-X, 2020 U.S. Dist. LEXIS 53354, *5 (N.D. Tex. Mar. 27, 2020) (Starr, J.).

RESPONSE

I. Employer Plaintiffs' Fourth Amendment claim is not moot.

The amendment of a legal provision does not "automatically" make a challenge to the constitutionality of that provision moot. *Habetz v. La. High Sch. Athletic Ass'n*, 842 F.2d 136, 137 (5th Cir. 1988). A case may become moot by voluntary cessation if (1) it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," and (2) any "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Los Angeles Cty. v. Davis*, 440 U.S. 625, 631 (1979). A case is moot only "'when it is impossible for a court to grant any effectual relief whatever to the prevailing party.'" *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (quoting *Knox v. SEIU, Local 1000*, 567 U.S. 298, 307 (2012)). "[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Ellis v. Bhd. of Ry.*, 466 U.S. 435, 442 (1984).

The City claims that its amendments to the Dallas City Code moot the Employer Plaintiffs' Fourth Amendment claim by fixing the problem identified by the Court in the Memorandum Opinion. But amending a challenged legal provision does not always moot a case.

The City must overcome an exception to mootness providing that "the voluntary cessation of a complained-of activity by a defendant ordinarily does not

moot a case." *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 324 (5th Cir. 2009). "Otherwise, a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends." *Already, LLC v. Nike, Inc.*, 133 S.Ct. 721, 727 (2013). Once the defendant has ceased its challenged conduct, a challenge is moot only if the defendant successfully "bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Id*. When the defendant is the government, however, its burden is lighter, with courts treating the government's cessation of allegedly wrongful conduct "with some solicitude" given that the government, unlike private litigants, is presumed to act in good faith. *Sossamon*, 560 F.3d at 325.

The City's conduct here causes two initial problems with meeting its burden. First, it (purportedly) ceased its injurious conduct (that is, it amended the Dallas City Code) only after this Court preliminary enjoined the Ordinance and kept the Fourth Amendment claim alive as the sole federal claim, suggesting a lack of good faith. *See Allied Home Mortg. Corp. v. United States HUD*, 618 F. App'x 781, 786 n.6 (5th Cir. 2015) ("The fact that HUD withdrew the suspensions only after the district court preliminarily enjoined them cuts against HUD's claim of permanent cessation."); *cf. Sossamon*, 560 F.3d at 325 ("The good faith nature of Texas's cessation is buttressed by the fact that Sossamon did not obtain relief below. Had the trial court granted the injunction, we might view any attempt to force a vacatur of such a determination (particularly in favor of a pro se prisoner) with a jaundiced eye.").

Second, the City continues to defend the constitutionality of the unamended subpoena provisions that the Court found unlawful. (Dkt. #69 at 5, 6, 7; Dkt. #70 at 10, 11). This also is an indication of bad faith in the mootness context. *See Pro-Life Cougars v. Univ. of Houston*, 259 F.Supp.2d 575, 581 (S.D. Tex. 2003) ("Defendants' persistent defense of the constitutionality of the First Policy, and the power of the University to re-enact it, prevents the Court from finding that the constitutional question is moot."); *Amawi v. Pflugerville Indep. Sch. Dist.*, No. 1:18-CV-1091-RP, 2019 U.S. Dist. LEXIS 177646, at *15 (W.D. Tex. July 23, 2019) (finding persistent defense of a challenged statute's constitutionality, even after it was preliminarily enjoined meant it was not "absolutely clear" that, if the case were found moot, the Legislature would not reenact it).

The City also fails to show that its "cessation"–the amendments to the Dallas City Code relating to subpoenas–actually ceases to cause the injury alleged by the Employer Plaintiffs: failure to comply with the requirements of the Fourth Amendment for pre-compliance review of the legality of administrative subpoenas in court.

In *Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, the Court considered a challenge to Jacksonville's minority set-aside program for city contracts. 508 U.S. 656, 658 (1993). Jacksonville repealed its ordinance and replaced it with a milder set-aside program. *Id.* at 660-61. The Court held that the repeal of the prior ordinance did not moot the case, relying on its prior decision in *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982). *Associated*

Gen. Contractors, 508 U.S. at 661-62 (quoting *City of Mesquite*, 455 U.S. at 289). The Court explained that . . . "it [did not] matter that the new ordinance differs in certain respects from the old one." *Id.* at 622. "The Court said that the new statute posed the same basic constitutional question and thus repeal of the earlier law did not moot the case." *Id*. It further explained that:

> There is no mere risk that Jacksonville will repeat its allegedly wrongful conduct; it has already done so. . . . The gravamen of petitioner's complaint is that its members are disadvantaged in their efforts to obtain city contracts. The new ordinance may disadvantage them to a lesser degree than the old one, but insofar as it accords preferential treatment to black- and female-owned contractors . . . it disadvantages them in the same fundamental way.

Id. Similarly, in *Knox*, the Supreme Court was faced with an assertion of mootness. 567 U.S. 298. The issue in that case was whether a public sector union had provided nonmembers the sort of notice required by the Court's case law before they could be forced to pay a fee to subsidize certain union activities. Before the case was resolved, the union sent out a new notice and subsequently moved to dismiss the case as moot. The employees objected that the new notice was still inadequate. The Court refused to dismiss, and held that the case was not moot because "there [was] still a live controversy as to the adequacy" of the notice. *Id*. at 307. Although the new notice might have given the nonmembers most of what they sought, they still possessed "a concrete interest, however small, in the outcome of the litigation." *Id*. at 307-308.

Similarly, there remains a live controversy in this case over whether the subpoena provision of the Ordinance, even with the amended portions of the Dallas City Code, provides the level of pre-compliance review required by the Fourth

Amendment.

The City amended two sections of the Dallas City Code (though not any part of the subpoena provision of the Ordinance itself). First it added the following:

> A person receiving a subpoena in accordance with this section may, before the return date specified in the subpoena, petition the [Dallas Municipal] [C]ourt for a motion to modify or quash the subpoena. This provision for pre-compliance review applies to all subpoenas, including [those issued under the provision in the Ordinance].

Dall. City Code § 2-8. It also amended an adjacent provision to say:

> Any person who . . . fails to file a motion to quash or otherwise demand a pre-compliance review of the subpoena in accordance with Section 2-8 . . . is guilty of an offense [upon conviction by a fine not to exceed $500].

Dall. City Code § 2-9. These provisions do not resolve the constitutional problems alleged by Employer Plaintiffs and previously recognized by the Court; "it disadvantages them in the same fundamental way." *Associated Gen. Contractors*, 508 U.S. at 662.

First, Section 2-9 actually creates an offense penalizing any target of a subpoena who does not file a lawsuit in the Dallas Municipal Court to move to quash the subpoena. How this helps to resolve the constitutional problem is a mystery. But even worse, this is combined with Section 2-8 that places the burden on targets of subpoenas to take the initiative to file a lawsuit in Dallas Municipal Court if they desire pre-compliance review. It states that they may do this "before the return date specified in the subpoena," but does not place any limits on that timeframe. *Cf. Cotropia v. Chapman*, 721 F. App'x 354, 359 (5th Cir. 2018) (administrative subpoena

provision at issue placed a timeframe of 14 days in the absence of an urgent situation). Placing on the target the burden of finding an attorney and drafting a complaint and a motion to quash, and having it ruled on before the specified date fails to solve the constitutional problem because "[g]enerally, when an administrative agency subpoenas books or records, the agency itself may not force compliance by the levy of a fine or imprisonment. . . . Rather, the agency petitions the court for an order forcing compliance, which results in an adversary proceeding where objections by the affected individual may be interposed." *Cotropia*, 721 F. App'x at 359 (citing 5 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 10.1(d) (5th ed. 2012)) (cleaned up). The Fifth Circuit in *Cotropia* noted that the subpoena provision there placed the onus on the agency to file suit in court to be able to enforce a subpoena against a recalcitrant target, where "a court can, prior to compliance, determine whether the subpoena is valid." *Id.* at 358 n.2; *see also Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 195 (1946) ("The facts in both cases show that petitioners, when served with the subpoenas, declined to honor them upon the advice of counsel, and thereafter the Administrator applied to the court for enforcement in each case."); *McLane Co. v. EEOC*, 137 S.Ct. 1159, 1164 (2017) (the statute enables the EEOC to obtain evidence by "authoriz[ing] [the agency] to issue a subpoena and to seek an order [from a court] enforcing [the subpoena].").

Combined with the continued provision in the Ordinance that "[r]efusal to appear or produce any document or other evidence after receiving a subpoena pursuant to this section is a violation of this chapter [and an offense pursuant to

Section 2-9, with a fine of up to $500]," Dall. City Code § 20-10(b), this means that the City could issue a subpoena to a target with a short deadline to respond, and if that target were unable to file a complaint in the Dallas Municipal Court before the deadline, he would be automatically guilty of an offense "after *receiving* a subpoena," rather than for refusing to honor a subpoena after a court's enforcement order. Dall. City Code at § 20-10(b).

The Court has already rejected the constitutionality of such an approach. (Dkt #64 at 37). The purported "fix" of explicitly setting out that a target of a subpoena may file a lawsuit in court changes nothing; this could occur under the previous version of the subpoena provision examined by the Court, which never barred anyone from filing a lawsuit. As the Court explained in the Memorandum Opinion, the City previously argued that the subpoena provision would "allow an employer to question the reasonableness of the subpoena only *after* being subject to citation for failing to comply with an administrative subpoena, . . . [as he would] *then* have an opportunity to appear before the Dallas Municipal Court at which time it would have the opportunity to question the reasonableness of the subpoena." (Dkt. #64 at 37 (quoting Dkt. #36)) (emphases in original but otherwise cleaned up). The Court rejected such a process: "[t]his is not the order of events contemplated by the Fourth Amendment." (Dkt. #64 at 37). This Court's prior analysis of the constitutional requirements of pre-compliance review only makes sense if it found inadequate the process *the City* must undertake in seeking the involvement of the judiciary in reviewing the subpoena, not the process undertaken by *the target of the subpoena.*

The purpose of the "opportunity for precompliance review" is to "alter[] the [power] dynamic" between the investigators and individuals who are subject to administrative inspections, thereby "reduc[ing] the risk" that investigators use these inspections "as a pretext to harass" these individuals. *City of Los Angeles v. Patel*, 135 S.Ct. 2443, 2454 (2015). The City, even after its amendments to the Dallas City Code, has failed to satisfy its obligations under the Fourth Amendment; at the very least this dispute is still a live issue because the City has not borne its burden of demonstrating that its amendments to the Dallas City Code have "completely and irrevocably eradicated the effects of the alleged violation," *Davis*, 440 U.S. at 631; *see also Amawi*, 2019 U.S. Dist. LEXIS 177646, at *20-23 (amended statute did not make claim moot because it merely limited the violation). The Court should therefore proceed to evaluate the constitutionality of the Ordinance's subpoena provision.

II. The Court should continue exercising supplemental jurisdiction over Plaintiffs' state law claim.

This Court previously ruled that it had supplemental jurisdiction under Section 1367(a) and that it should exercise that jurisdiction under Section 1367(c). (Dkt. #64 at 38-46). Since then, the case has developed, and the case for exercising supplemental jurisdiction is even stronger. The Court should adhere to its previous decision.[1]

The City's renewed motion raises only one new issue: its motion to dismiss the

[1] To avoid burdening the Court with duplicative briefing, Plaintiffs incorporate by reference their previous arguments on supplemental jurisdiction. (Dkt. #47 at 4-14). They address the factors again only as they are affected by more recent developments.

Employer Plaintiffs' Fourth Amendment claim on the ground of mootness. (Dkt. #69 at 9), The Court should deny that motion for the reasons explained above, but regardless of how it resolves the Fourth Amendment claim, the Court should not decline supplemental jurisdiction. At this point, the vacatur of the Court's preliminary injunction would cause Plaintiffs irreparable harm.

Novelty or Complexity: As the Court previously ruled, "this case does not present a novel or complex issue of state law." (Dkt. #64 at 40). Texas precedent remains equally clear today. In fact, the City previously argued for novelty based on "a petition for review . . . pending before the Texas Supreme Court," (Dkt. #64 at 42), but that petition has since been denied. *See Tex. Ass'n of Bus. v. City of Austin*, 565 S.W.3d 425, 430 (Tex. App.—Austin 2018, pet. denied). As the Fifth Circuit has explained, "[t]he absence of any difficult state-law questions . . . weighs heavily" in favor of retaining jurisdiction. *Batiste v. Island Records, Inc.*, 179 F.3d 217, 227 (5th Cir. 1999) (reversing dismissal of state-law claims).

Judicial Economy: When the Court denied the City's original motion, it concluded that judicial economy "weighs slightly in favor of retaining the case." (Dkt. #64 at 44). That factor favors Plaintiffs much more strongly now. In deciding the motion for a preliminary injunction, this Court "invested a substantial amount of judicial resources into the case." (Dkt. #64 at 44). This "familiarity . . . with the merits of [Plaintiffs'] claims demonstrates that further proceedings in the district court would prevent redundancy and conserve scarce judicial resources." *Batiste*, 179 F.3d at 228. Indeed, the Fifth Circuit has held that a "significant amount of judicial

resources invested by the district court" can require the court to retain jurisdiction over state-law claims. *Brookshire Bros. Holding v. Dayco Prods., Inc.*, 554 F.3d 595, 603 (5th Cir. 2009).

This case is almost over. As this Court has recognized, the issues "in this case are predominantly legal in nature." (Dkt. #64 at 43). Plaintiffs have filed a motion for summary judgment, (Dkt. #66), which is fully briefed as of today. Because "little remains to do in this case," the Court should exercise its supplemental jurisdiction. *Lamar Tex. L.P. v. City of Port Isabel*, No. 1:08-cv-115, 2010 U.S. Dist. LEXIS 8881, at *12 (S.D. Tex. Feb. 3, 2010).

For the parties to start over in state court—with pleadings, motions to dismiss, motions for preliminary injunctions, and motions for summary judgment—would be a waste of everybody's resources. *See Doddy v. Oxy USA*, 101 F.3d 448, 456 (5th Cir. 1996) (affirming retention of jurisdiction where "summary judgment motions . . . were pending"); *Mendoza v. Murphy*, 532 F.3d 342, 347 (5th Cir. 2008) (similar); *Newport, Ltd. v. Sears, Roebuck & Co.*, 941 F.2d 302, 308 (5th Cir. 1991) (emphasizing "the resources, public and private, already invested in this lawsuit").

Fifth Circuit "case law is clear that when a district court declines to exercise jurisdiction over remaining state law claims following the dismissal of all federal-law claims and remands a suit after investing a significant amount of judicial resources in the litigation analogous to that invested by the district court in this case, that court has abused its discretion under 28 U.S.C. § 1367." *Brookshire Bros. Holding*, 554 F.3d at 602.

Fairness: After considering the City's original motion, the Court considered the "fairness" factor "neutral." (Dkt. #64 at 43). Since then, the Court has granted Plaintiffs' motion for a preliminary injunction. (Dkt. #64 at 46-63). "[I]f the Court were to decline supplemental jurisdiction, plaintiffs might be deprived of the previously-granted injunctive relief, without which they would suffer irreparable injury." *Motorola Credit Corp. v. Uzan*, 274 F.Supp.2d 481, 497–98 (S.D.N.Y. 2003) (retaining supplemental jurisdiction after dismissal of all federal-law claims), *aff'd in relevant part*, 388 F.3d 39 (2d Cir. 2004). The "significant risk that [the City] will attempt to re-litigate in state court rulings made against it by the district court," including Plaintiffs' entitlement to a preliminary injunction, also supports retaining jurisdiction. *Brookshire Bros. Holding*, 554 F.3d at 603.

CONCLUSION

The City's motion to dismiss Employer Plaintiffs' Fourth Amendment claim as moot should be denied on the ground that the amendments to the Dallas City Code do not resolve the constitutional claim against the Ordinance's subpoena provision. Because the federal claim is not moot, there is no reason for the Court to reconsider its prior decision to exercise supplemental jurisdiction over Plaintiffs' state law claim that the Ordinance is preempted by the Texas Minimum Wage Act.

Even if the Court were to find the federal Fourth Amendment claim moot, the relevant factors under Section 1367 should lead it to continue to exercise supplemental jurisdiction over the state law claim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing document was electronically filed on July 24, 2020 with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/Robert Henneke
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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.	§	NO. 4:19-cv-00570-SDJ
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[PROPOSED] ORDER DENYING DEFENDANTS' MOTION TO DISMISS UNDER RULE 12(b)1), RENEWED MOTION TO DECLINE SUPPLEMENTAL JURISDICTION

Before the Court is Defendants' Motion to Dismiss Under Rule 12(b)(1), Renewed Motion to Decline Supplemental Jurisdiction. Having considered the Motion, the responses, and any reply thereto, the Court is of the opinion that the Motion should be DENIED.

IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss Under Rule 12(b)(1), Renewed Motion to Decline Supplemental Jurisdiction is hereby DENIED.