No. 03-18-00445-CV

IN THE THIRD COURT OF APPEALS
AUSTIN, TEXAS

TEXAS ASSOCIATION OF BUSINESS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, AMERICAN STAFFING ASSOCIATION, LEADINGEDGE PERSONNEL, LTD., STAFF FORCE, INC., HT STAFFING, LTD, D/B/A THE HT GROUP, THE BURNETT COMPANIES CONSOLIDATED, INC. D/B/A BURNETT SPECIALISTS, SOCIETY FOR HUMAN RESOURCE MANAGEMENT, AUSTIN HUMAN RESOURCE MANAGEMENT ASSOCIATION, AND STRICKLAND SCHOOL, LLC,
Plaintiffs – Appellants / Cross – Appellees,

and

THE STATE OF TEXAS,
Intervenor – Plaintiff – Appellant / Cross – Appellee,
v.

CITY OF AUSTIN, TEXAS AND SPENCER CRONK, CITY MANAGER OF THE CITY OF AUSTIN,
Defendants – Appellees / Cross – Appellants

Appeal from Cause No. D-1-GN-18-001968
53rd Judicial District Court of Travis County, Texas

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STATEMENT REGARDING ORAL ARGUMENT

Appellees request oral argument on Appellants' claims, as well as on their cross-appeal. Both present important issues regarding separation of powers, the role of the courts and governance of home-rule cities.

RESTATED ISSUES PRESENTED

Issue One

As the arbiter vested with the authority to weigh the evidence and decide legal issues, did the trial judge abuse his discretion in denying the request of the Plaintiffs and the State to temporarily enjoin the City's paid sick leave Ordinance?

Sub-issue A

To obtain a temporary injunction, Plaintiffs had the burden to plead and prove a cause of action, a probable right of recovery, and a probable, imminent, and irreparable injury. Their disagreement with the Ordinance on policy grounds did not satisfy the requirements. Was it clear error for the trial court to conclude Plaintiffs failed to meet their burden to establish entitlement to such an extraordinary remedy?

Sub-issue B

The State, like all other litigants, was required to meet the same requirements to obtain a temporary injunction. Having presented no evidence at the hearing, was it clear error for the trial court to conclude the State failed to meet their burden to establish entitlement to such an extraordinary remedy?

Issue Two

Did the trial court abuse its sound discretion in admitting into evidence self-authenticating records over Plaintiffs' objections, and did such evidence probably result in an improper judgment?

TO THE HONORABLE THIRD COURT OF APPEALS:

Contrary to the assertions in Plaintiffs' brief, the trial court did not "fail to understand" the arguments and evidence presented at the hearing on their temporary injunction request. Rather, after considering the evidence presented, and the fact the state chose to present none, the trial court determined the Plaintiffs and the state had not shown themselves entitled to the extraordinary remedy of enjoining the City's Paid Sick Leave Ordinance ("Ordinance") while their case proceeds. The record confirms the court's conclusion was not a clear abuse of discretion. Appellees the City of Austin and its City Manager Spencer Cronk request that the trial court's order denying the temporary injunction be affirmed.

STATEMENT OF FACTS

The City's Paid Sick Leave Ordinance is passed and the City is sued.

Appellees incorporate by reference the Statement of Facts contained in its opening brief, including the section regarding the enactment of the Ordinance.

The Court hears and denies Appellants' temporary injunction request.

After filing suit in late April 2018, Plaintiffs, joined by the State of Texas as Intervenor (together "Appellants"), set a hearing in late June on their request for a temporary injunction to stop the Ordinance from taking effect while their lawsuit was pending. Their timing was odd. The Ordinance would not take effect until

October, and the allegations in Plaintiffs' pleading did not indicate they had yet suffered injury. At the beginning of the hearing, Plaintiffs' counsel explained there was "injury being suffered" because businesses were "looking at what they have to do to prepare to comply incurring costs now." 2RR11, App A[1] Plaintiffs then called four witnesses. The State called no witnesses and offered no evidence at all to support its entitlement to injunctive relief. Plaintiffs' four witnesses testified as follows.

Ellen Troxclair, one of the two Austin City Council members who voted against the Ordinance, did so because she "didn't have the information that [she] needed to make an informed decision." 2RR46. Before voting, Ms. Troxclair reviewed a study by the Institute for Women's Policy Research on "Access to Paid Sick Time in Austin, Texas" indicating, among other things about the Austin labor market, that approximately 37% of workers in her city had no access to paid sick leave. 2RR64-65, App. A; 4RR33-39. She claimed the data in the study regarding Austin was "extrapolated" from national and state studies, and for that reason she was "unknowledgeable" as to its validity. 2RR65-66, App. A. Ms. Troxclair agreed that individuals who do not receive paid leave would benefit from being able to stay home and take care of themselves when sick rather than coming into work

[1] The cited pages of the hearing testimony in the reporter's record are attached in the appendix as App. A & B. The referenced testimony is highlighted.

and potentially getting others sick. 2RR63, App. A. She further agreed that earning paid sick leave can have a positive effect on individuals and the public health of Austinites. 2RR54-55, App. A.

Doug Rigdon owns, directs, and works for for-profit Strickland Christian School in Austin, one of the Plaintiffs. 2RR73, 92, App. A. The school has about 21 employees. 2RR78, App. A. Strickland School and its competitors are not unionized. 2RR112, App. A. Strickland School charges tuition that is 30% lower than its competitors, which the school can afford to do by not having "too many frills." 2RR76-77, App. A.

Despite the lack of frills, the school already provides these employees with paid leave which they can use when they are sick. 2RR79, App. A. Their paid leave is already tracked on their paystubs. 2RR83-84, App. A. Mr. Rigdon opposed the Ordinance but believed the school's current administrative staff could handle the leave tracking and paperwork it would require. 2RR108-09, App. A. Under the Ordinance, he believed the school would be required to give its employees "close to the same" amount of paid leave they already receive, describing the time as "fairly comparable." 2RR101-02, App. A.

Mr. Rigdon believed the school might have to raise its tuition next year to cover any additional cost of complying with the Ordinance, which might cause

some students not to re-enroll. 2RR89, App. A. But Strickland already raises its tuition 3 to 4% each year and has done so for years. 2RR93-94, App. A. Last year, about 30 students did not re-enroll, about 25 of those did so "for some other reason" unrelated to the annual tuition hike. 2RR114, App. A. Mr. Rigdon estimated the additional cost to Strickland in providing paid leave under the Ordinance would be about $1,000 to $2,500 over the course of a year, which would amount to an annual tuition increase of about $10 to $12 per student. 2RR113,113 App. A. As of the hearing, Strickland had spent no money preparing to comply with the Ordinance. 2RR106-07, App. A.

Kelly Hudson owns LeadingEdge Personnel, a temporary service in Austin and one of the Plaintiffs. LeadingEdge employs temporary workers who work mainly in office and clerical jobs, like receptionists and customer service, for clients of the company. 3RR33, App. B. None of LeadingEdge's competitors has a unionized workforce. 3RR43, App. B. The company's temporary employees ordinarily work at one location for their shift and keeping track whether that location is in Austin "doesn't sound like a terrible task" to Mr. Hudson. 3RR50-51, App. B. LeadingEdge has "a high turnover" for its temporary workers, and every day "is a moving target" for employee headcount. 3RR11, App. B. Temporary employees are usually with LeadingEdge for only "weeks to months."

3RR39, App. B.

Mr. Hudson estimated a cost of around $1,000 for his company to print new employee handbooks to include information about the Ordinance, although it prints new handbooks every year. 3RR13, 43, App. B. Updating the company's orientation video for employees could cost up to $3,000, but Mr. Hudson did not know if the Ordinance required his company to update that video. 3RR45, App. B. The company already uses software to track the work hours of its temporary employees and Mr. Hudson did not know if the software program could be updated to track the accrual rate of sick leave under the Ordinance. 3RR64, App. B.

Annie Spilman is a lobbyist for the Texas chapter of the National Federation of Independent Business (NFIB), one of the Plaintiffs. 3RR94, App. B. Her role in the lawsuit is to "represent and advocate" for members who own businesses. 3RR77, App. B. She would not reveal who those members are because "it's confidential." 3RR, 124, App. B. As a paid advocate she was "absolutely" opposed to an ordinance providing any sort of paid sick leave for employees. 3RR99-100, App. B. She claimed her members have "gotten no assistance from the City at all" in complying with Ordinance and spoke of phone calls where "the City was instructed not to speak about the paid sick leave." 3RR85, App. B. She

didn't make these calls herself but heard about them second or third hand and did not "want to speculate" whether what she heard was accurate. 3RR101-102, App. B.

The City called no witnesses at the hearing. The court admitted into evidence Defendants' Ex. 6A & 6B, offered by the City. 3RR147. These two exhibits were a compendium of records maintained by the City Clerk relating to the enactment of the Ordinance and the stakeholder process that preceded the vote. 3RR144-145. Plaintiffs' objections to admissibility of the exhibits were overruled. 3RR145-153.

After hearing the evidence and arguments of counsel, the trial court denied the request by Appellants for a temporary injunction from the bench. An order to that effect was entered July 2. CR225-26. On July 5, Appellants filed their joint notice of appeal. CR230-32.

SUMMARY OF ARGUMENT

By design and tradition, trial courts have broad discretion to hear and decide issues brought before them, especially when litigants seek the extraordinary remedy of a temporary injunction. Here, the State chose to present **no evidence at all**. The nature of the relief is even more extraordinary when the trial court is asked to enjoin governmental entities like the City of Austin from implementing regulations aimed at protecting the public's health, safety and welfare. The trial court's broad discretion would be meaningless if the reviewing court reweighs the evidence and second-guesses the ruling.

The City's Paid Sick Leave Ordinance was passed by a fully authorized vote of the mayor and City Council after months of input from community stakeholders. It is a legitimate exercise of a home-rule city's broad power to govern itself. The Texas Constitution established this power to permit cities the liberty to respond to their own unique challenges and freedom to shape their own futures, consistent with city charters approved by the people in the community.

The Texas Minimum Wage Act ("TMWA") governs precisely that: the minimum wage. Paid sick benefits are not "wages" under that law. The doctrine of preemption applies only where the legislature has spoken with "unmistakable clarity" to preempt a home-rule city's authority. Since there is no such clarity,

Plaintiffs vowed to pass a preempting law next legislative session. But they could not get the new law passed until the Legislature meets next year, so they attempted to stall the Ordinance in court. This Court should resist the invitation of Appellants to rewrite a state statute in the guise of interpreting it, a task the trial court judiciously refused to undertake. Appellants are not entitled to do in the courthouse what must be done in the state house.

Appellants opposed the Ordinance and sued the City to stop it. As aggrieved persons, it is the right of Plaintiffs to bring such an action. But to obtain relief, their claims must be facially valid and ripe, standing must be satisfied, and the City's immunity must not pose an obstacle. These preconditions are not easily met. Moreover, in establishing a probable right of recovery, allegations of attenuated, hypothetical, and contingent events that may not come to pass do not suffice, nor do claims attempting to extend constitutional protections where they simply do not reach.

At this initial stage of the proceedings, the denial of Appellants' injunction request, based on the judge's assessment of the evidence (and lack thereof) was well within the trial court's discretion. The trial court could have denied injunctive relief on the ground that Appellants had not pleaded and proved viable claims, that they had not shown a probable right of recovery, that they had not shown a

probable, imminent, and irreparable injury, or any combination of one or more of those reasons, all without clearly abusing the discretion it is afforded on such matters. Further, no evidentiary rulings led to reversible error. Based on the record, and viewing the evidence in the light most favorable to the ruling, there is no basis for concluding that the trial court clearly abused its discretion in denying injunctive relief.

STANDARD OF REVIEW

I. Standard of review for trial court's denial of a temporary injunction.

A party seeking a temporary injunction must plead **and prove:** (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). The party seeking the injunction bears the burden of proving all of these elements. *Cold Spring Granite Co. v. Karrasch*, 96 S.W.3d 514, 516 (Tex. App.—Austin 2002, no pet.). These requirements apply equally to the State as they do any other temporary injunction applicant. *See State v. Zanco's Heirs*, 44 S.W. 527, 529 (Tex. Civ. App.—San Antonio 1898, writ ref'd).

An appellate court may only reverse the trial court's decision if there was a "*clear* abuse of that discretion." *Walling v. Metcalf*, 863 S.W.2d 56, 57 (Tex. 1993) (emphasis added). The court of appeals cannot substitute its judgment for that of

the trial court, even if it would have reached a contrary conclusion. *Butnaru*, 84 S.W.3d at 211. There is no clear abuse of discretion if an applicant fails to show a probable right to recover after a final hearing. *Crestview, Ltd. v. Foremost Ins. Co.*, 621 S.W.2d 816, 828 (Tex. Civ. App.—Austin 1981, writ ref'd n.r.e.). There is likewise no clear abuse when the trial court bases its decision on conflicting evidence. *Davis v. Huey*, 571 S.W.2d 859 (Tex. 1978). Further, in conducting its review, the appellate court must draw all legitimate inferences from the evidence in the light most favorable to the trial court's order. *State v. Ruiz Wholesale Co.*, 901 S.W.2d 772, 777 (Tex. App.—Austin 1995, no writ).

The appellate court "cannot overrule the trial court's decision unless the trial court acted unreasonably or in an arbitrary manner, without reference to guiding rules or principles." *Butnaru*, 84 S.W.3d at 211. When no findings of fact or conclusions of law are filed, the trial court's decision on granting or denying a temporary injunction may be upheld on any legal theory supported by the record. *Davis*, 571 S.W.2d at 862.

II. Standard of review for trial court's evidentiary rulings.

Evidentiary rulings are reviewed for abuse of discretion. *Owens-Corning Fiberglass Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998). To obtain reversal of a judgment based on error in the admission or exclusion of evidence, an appellant

must show that the trial court's ruling was erroneous and that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. *Gee v. Liberty Mu. Fire Ins. Co.,* 765 S.W.2d 394, 396 (Tex. 1989); Tex. R. App. P. 44.1(a)(1).

ARGUMENT AND AUTHORITIES

I. Plaintiffs and the State failed to plead and prove a cause of action and a probable right of recovery on their preemption claim.

Plaintiffs and the State argue that the Ordinance is preempted while ignoring that that is not the question before the Court. The issue at this stage is not whether the Ordinance is preempted, but rather whether they pleaded a cause of action and a probable right of recovery on their preemption claim. They cannot "use an appeal of a temporary injunction ruling to get an advance ruling on the merits." *See Dall./Fort Worth Int'l. Airport Bd. v. Ass'n of Taxicab Operators, USA*, 335 S.W.3d 361, 364 (Tex. App.—Dallas 2010, no pet.). Extensive briefing by Plaintiffs and the State fails to establish that the Legislature's intent to ban a city from enacting an ordinance for paid sick leave appears with such "unmistakable clarity" in the TMWA that they showed a probable right of recovery on their preemption claim. More importantly, Plaintiffs and the State cannot establish that the trial court clearly abused its discretion if it determined that they failed to plead and prove a valid cause of action, a probable right to the relief sought, or failed to satisfy

both elements.

A. To preempt a local law, the Legislature's intent to preempt the subject matter must be unmistakably clear.

Like all home-rule municipalities in Texas, Austin possesses the "full power of local self-government." Tex. Loc. Gov't Code § 51.072(a). That authority comes from the state's Constitution, not the Legislature. *Lower Colo. River Auth. v. City of San Marcos*, 523 S.W.2d 641, 643 (Tex. 1975) (citing Tex. Const. Art. XI, § 5). The Legislature may limit a home-rule city's power to self-govern, but the intent to preempt local law must be made with "unmistakable clarity." *Dallas Merch.'s & Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 491 (Tex. 1993). 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). Further, "[t]he entry of the state into a field of legislation . . . does not automatically preempt that field from city regulation; local regulation, ancillary to and in harmony with the general scope and purpose of the state enactment, is acceptable." *Id.*

Because the "unmistakable clarity" standard is a strict one, courts tread lightly when determining whether city ordinances are preempted by statute. As the Texas Supreme Court recently noted, "[a]bsent an express limitation, if the

general law and local regulation can coexist peacefully without stepping on each other's toes, both will be given effect or the latter will be invalid only to the extent of any inconsistency." *City of Laredo v. Laredo Merchs. Ass'n*, No. 16-0748, 2018 WL 3078112, at *5 (Tex. June 22, 2018).

B. Plaintiffs and the State have not shown that the Legislature's intent to preempt a paid sick leave ordinance is sufficiently clear such that they have a probable right of recovery.

Determining intent to preempt requires statutory construction. The plain meaning of the text is the best expression of legislative intent unless a different meaning is apparent from the context or the plain meaning leads to absurd or nonsensical results. *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011). Words and phrases are to be read in context and construed according to the rules of grammar and common usage. Tex. Gov't Code 311.011(a). It is presumed that a just and reasonable result is intended. *Id.* § 311.021(3). A court may consider the circumstances under which the statute was enacted, legislative history, consequences of a particular construction, and the title, among other matters. *Id.* § 311.023. A court "shall diligently attempt to ascertain legislative intent and shall consider at all times the old law, the evil, and the remedy." *Id.* § 312.005.

1. The plain meaning of "wages" in the TMWA is compensation for services, not fringe benefits.

For the TMWA to preempt the Ordinance, "wage" as that term is used in

that law would have to include paid sick leave. The plain meaning of that term is not so broad, however. The word "wage" is not defined in the TMWA itself and, accordingly, "that term is imbued with the plain meaning as commonly understood at the time of enactment." *Thompson v. Tex. Dep't of Licensing and Regulation*, 455 S.W.3d 569, 570 (Tex. 2014) (per curiam); Tex. Gov't Code 311.011(a). At the time the Texas Minimum Wage Act was first enacted in 1970, a leading popular dictionary defined the common meaning of "wage" as "payment for services to a workman; usually remuneration on an hourly, daily, or weekly basis or by the piece." The American Heritage Dictionary of the English Language 1440 (1st ed. 1969). The leading legal dictionary from the time the Fair Labor Standards Act ("FLSA") – upon which the TMWA was based, as discussed below – was passed similarly defines "wages" as "compensation given to a hired person for his or her services; . . . Agreed compensation for services by workmen, clerks or servants . . . whether they be paid by the hour, the day, the week, the month, the job or the piece." Black's Law Dictionary 1826 (3d ed. 1933). What these definitions have in common is that "wage" or "wages" is a payment regularly made to compensate the worker for his or her services or labor. Neither definition captures paid sick leave of the type the Ordinance regulates.

Rather than argue that the commonly understood meaning of "wage" during

the relevant time period encompassed paid sick leave, Plaintiffs and the State urge this Court to apply the definition of "wage" from Black's Law Dictionary, Webster's Collegiate Dictionary, and American Heritage Dictionary, published in 1990, 2014, and 2016 respectively. State Appellant's Br. 11–13; Pls. Appellants' Br. 23–25. But the legal dictionary definition of "wage" in 1990 has little to do with the meaning of "wage" in 1938, when the FLSA was passed, or in 1970, when the TMWA was first passed. The State does not explain why dictionaries published in 2014 and 2016 shed light on the commonly-understood meaning of "wage" in 1970 or 1938.

The 1990 Black's Law Dictionary definition makes no sense in the context of the TMWA. Its expansive definition of "wages" includes not only "periodic monetary earnings" but "*all compensation* for services rendered . . . without regard to the manner . . . in which such compensation is computed." *See* Black's Law Dictionary 1091 (6th ed. 1990) (emphasis added). If the entire Black's definition of "wages" were applied to the TMWA, then employers could satisfy their minimum wage obligations by compensating employees with egg salad sandwiches, Monopoly money or magic beans, none of which would be "periodic monetary earnings" but would nonetheless be considered "wages" according to this definition. Clearly, this was not the meaning of the term when the federal and

state legislatures wrote their minimum wage laws.

The broad definition in Black's goes far beyond the core meaning of the term; courts should avoid such definitions when constructing statutes. *See* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 418 (2012) ("A dictionary definition states the core meanings of a term and cannot delineate the periphery."). What the cited dictionary definitions have in common is that the payment is regularly made to compensate the worker for his or her services or labor. By contrast, a sick leave benefit is not paid with regularity nor is it compensation for the employee's labor. It is an accrued benefit which an employee may use only for specified purposes. That interpretation is consistent with federal and state minimum wage laws and the core meaning found in the cited dictionaries. The trial court could have reached this same conclusion without clearly abusing its discretion.

2. The history of the TMWA and its relationship with the FLSA indicates that the meaning of "wages" does not encompass the benefit of paid sick leave.

a. The Texas Legislature enacted the TMWA against the backdrop of the FLSA.

Using its powers under the Commerce Clause, Congress enacted the FLSA in 1938 "to establish labor standards in order to maintain the minimum standard of living necessary for health, efficiency, and general well-being of workers." *Cash*

v. Conn Appliances, Inc., 2 F. Supp. 2d 884, 889 (E.D. Tex. 1997). Section 6 of the FLSA mandates an hourly minimum wage due to all employees, while Section 7 delineates maximum work hour limitations for certain classes of employees. *Id.* at 890.

Against this backdrop of the federal minimum wage regulation, in 1970 the Texas Legislature passed the "Texas Minimum Wage Act of 1970" which set the "minimum wage" at "not less than $1.25 an hour on and after February 1, 1970; and (2) not less than $1.40 an hour on and after February 1, 1971." Act of May 30, 1969, 61st Leg., Ceh. 796, § 5, 1969 Tex. Gen'l Laws (amended 1987) (current version at Tex. Lab. Code § 62.051). In expressing the purpose of the Act, the legislature found many Texans were ". . . working for wages that are not sufficient, in view of the cost of living, to enable them to maintain a standard of living necessary for the health, efficiency, and general well-being of themselves or their families"—the same purpose underlying the FLSA passed three decades earlier. *See* Act of May 30, 1969, 61st Leg., Ceh. 796, § 5, 1969 Tex. Gen'l Laws § 1. Employee benefits like sick leave were not mentioned in the Act.

The Legislature amended the "Texas Minimum Wage Act of 1970" in 1987, changing the title to simply "Texas Minimum Wage Act," and requiring that "every employer shall pay to each of his employees not less than $3.35 an hour . . . ." Act

of June 19, 1987, 70th Leg., Ceh. 1104, § 4, 1987 Tex. Gen'l Laws (amended 2001) (current version at Tex. Lab. Code § 62.051). In 1993, the Legislature recodified this provision into the Labor Code and made other non-substantive revisions. *See* Act of May 22, 1993, 73rd Leg., Ch. 269, § 1, 1993 Tex. Gen'l Laws (amended 2001). In 2001, rather than continuing to regularly amend the Act to match the minimum hourly wage rate in the FLSA, the Legislature tied the State's minimum wage to that set out in Section 6 of the FLSA. Act of May 28, 2001, 77th Leg., Ch. 386, § 1, 2001 Tex. Gen'l Laws (amended 2003) (current version at Tex. Lab. Code § 62.051).

Both Plaintiffs and the State concede the TMWA "incorporate[ed] the standards of the FLSA into state law." CR98, 112, 187, 190.[2] The FLSA generally only protects employees of employers "engaged in commerce" with annual gross volume of sales or business of at least $500,000. 29 U.S.C. §§ 203(s)(1)(A), 206(a). This leaves a realm of employees in Texas who are not covered by the FLSA. In

[2] In a footnote to its brief, the State retreats from that position and instead argues the TMWA's incorporation of FLSA standards was very limited. *See* State Appellant's Br. 15 n.4. In spite of its new argument, however, the Attorney General continues to publicly announce that "[t]he [TMWA] broadly regulates the payment of wages in Texas *by incorporating the standards of the federal [FLSA] into state law*." Letter from David Hacker to City of San Antonio Mayor Ron Nirenberg and Members of City Council (July 9, 2018), *available at* https://www.texasattorneygeneral.gov/files/epress/OAG_Letter_to_San_Antonio_City_Council.pdf (emphasis added). While the Attorney General's announcement is correct in that the TMWA *did* incorporate the FLSA's standard for determining whether amounts an employee receives are "wages" for purposes of the minimum requirement, the TMWA does not "broadly regulate the payment of wages." *See id.*

Texas, those employees are generally covered by the TMWA, so long as they are not exempted under Subchapter D. *See* Tex. Lab. Code §§ 62.152–62.161. Conversely, the TMWA's minimum wage does not apply to employees covered by the FLSA, although the wage rates are identical. *See* Tex. Lab. Code § 62.151. This combination of state and federal minimum wage laws ensures that all qualifying Texas workers are paid at least minimum wage for their compensable time and furthers their shared purpose of a uniform guaranteed minimum wage for qualifying workers. *See Chambers v. Sears, Roebuck and Co*., 793 F.Supp.2d 938, 963 (S.D. Tex. 2010) (TMWA requires that employers pay employees the federal minimum wage), *aff'd*, 28 Fed. App'x 400, 410 (5th Cir. 2011).

b. Paid sick leave benefits are not "wages" under the FLSA.

Because the TMWA incorporates the FLSA's minimum wage standards, looking to the federal law helps determine the meaning of the Act. *See Harris Cty. Appraisal Dist. v. Tex. Workforce Comm'n*, 519 S.W.3d 113, 129 (Tex. 2017) (courts consider term's usage in other statutes, court decisions and similar authorities to determine meaning). The FLSA's definition of "wage" provides that, under certain circumstances, an employer may include "the reasonable cost . . . to the employer of furnishing such employee with board, lodging or other facilities" but only if those items "are customarily furnished by such employer to his employees." 29

U.S.C. § 203(m)(1). The FLSA's definition also provides that for tipped employees, the amount paid must equal the cash wage portion, plus "an additional amount on account of the tips received," which must total the federal minimum wage amount. *Id*. §203(m)(2)(A). Unsurprisingly, the TMWA mirrors the FLSA in stating what is includable in calculating the minimum wage paid. Tex. Lab. Code §§ 62.052, 62.053. Those are the only two such factors appearing in the TMWA. None of these factors states that paid sick leave is includable in computing the minimum wage, and for good reason.

Courts interpreting the FLSA have determined that fringe benefits like paid leave *are not* included when calculating whether an employee was paid at least minimum wage. *See, e.g.*, *Copeland v. ABB Inc*., No. 04-4275 cv NKL, 2006 WL 290596, at *3 (W.D. Mo. Feb. 7, 2006) (citing and agreeing with U.S. Department of Labor website guidance that "the FLSA does not govern fringe benefits such as paid leave"), *aff'd*, 521 F.3d 1010 (8th Cir. 2008); *Estes v. Iron Workers Dist. Council*, No. 1:16-cv-251, 2016 WL 7664346, at *3 (S.D. Ohio Nov. 4, 2016) (citing *Copeland* for the proposition that the "FLSA's scope is limited to unpaid wages, not other unpaid benefits"); *Ward v. Costco Wholesale Corp*., No. 2:08-CV-2013, 2009 WL 10670191, at *2 (C.D. Cal. May 6, 2009) ("The Court rejects Defendant's proposed calculation and concludes that vacation and sick pay should be excluded

from the calculation of whether the FLSA's minimum wage and overtime provisions have been satisfied."); *Chavez v. City of Albuquerque*, 630 F.3d 1300, 1308 (10th Cir. 2011) (compensation for vacation and sick days actually taken not includable in calculation of employee's regular rate of pay for FLSA overtime purposes). This meaning of "wages" likewise applies in the TMWA, which adopts the FLSA's minimum wage standards and which must be interpreted consistently with the FLSA.

3. Counting paid sick leave as "wages" is an unreasonable interpretation of the TMWA.

Counting fringe benefits such as paid sick leave in computing a minimum wage would lead to absurd results and undermine the very purpose of the TMWA to ensure a bare minimum standard of living for workers. An illustration demonstrates why counting paid sick leave benefits as "wages" makes no sense and permits employers to evade compliance. Assume a full-time employee working 40 hours per week is paid an hourly wage of $7.25. Under an existing benefits program offered by the employer, the employee accrues paid sick leave at the rate of one hour for every 30 worked. The benefit is paid at the same hourly rate of $7.25.[3] The employee has accrued two days of sick leave, totaling 16 hours.

[3] The current minimum wage under the FLSA and the TMWA is $7.25 per hour.

During one week, the employee works three days (24 hours) and takes two accrued sick days (16 hours). Adding the pay earned for the hours worked plus the paid sick leave benefit, the employee's gross paycheck for that week is $290.00, or $7.25 x 40. Under the illustration in the State's brief, the employee's "actual hourly wage" that week would be $12.08, which is the employee's total pay divided by the 24 hours worked.

Under Plaintiffs' and the State's interpretation of "wages," the employer could reduce the employee's hourly wage for that work week to something less than $7.25 and still satisfy the minimum wage requirement. This is because the employee's "actual hourly rate" exceeds $7.25. For example, the employer could pay the employee $7.00 per hour that week plus 16 hours of sick leave benefits at the same rate, which would yield a gross weekly paycheck of $280.00 ($7.00 x 40). That total divided by the 24 hours the employee worked is $11.66. If the paid sick leave benefit is included in the calculation of "wages" for that week, as Plaintiffs and the State claim it must be under the TMWA, then the employer could claim to have paid the employee an "actual hourly rate" that is *more* than the mandated minimum wage of $7.25 per hour. Neither the FLSA nor the TMWA contemplates such manipulation of the employee's pay and benefits since it would permit employers to pay less than minimum wage.

The reason fringe benefits such as paid sick leave are not included as wages for purposes of determining the minimum wage is that the minimum wage compensates an employee for labor. By contrast, the paid sick leave contemplated by the Ordinance is a benefit an employee is eligible to receive if that employee accrues a specified amount of work hours and qualifies for the leave under one of the enumerated uses for paid sick leave. 4RR8-9. The State's characterization of accrual of leave benefits as "a raise in all but name," *see* State Appellant's Br. 18, is wholly inaccurate. Unlike a pay raise, an employee only receives a paid sick leave benefit if it is earned and used. An employer need not pay any sick leave benefit if the employee does not qualify for it. Although the employee accrues sick leave by working, the employee receives the benefit only under qualifying conditions. It is not a regular payment the employee expects to receive week to week. The paid sick leave required under the Ordinance fundamentally differs from wages, and the minimum wage provisions of the TMWA and FLSA do not address it.

4. The Texas Payday Act's definition of "wages" does not apply to the TMWA.

This Court should resist Plaintiffs' suggestion to apply the definition of "wages" under the Texas Payday Act ("TPA") to the TMWA.

First, the fact that the TPA and TMWA appear consecutively in the Texas Labor Code is of little to no significance. They only do so by virtue of a non-

substantive revision and recodification by the Texas Legislative Council which was adopted by the Texas Legislature in 1993. *See* Tex. Legislative Council, Revisor's Report: Labor Code Vol. 1, A Nonsubstantive Revision of the Statutes Relating to Local Government, 73rd Leg. v-vi (1993). The Texas Legislature specifically forbade the Texas Legislative Council from altering "the sense, meaning, or effect of the statute" through such efforts. Tex. Gov't Code § 323.007. The fact that these two acts appear consecutively in the Labor Code should not be used as a tool of construction.

Second, it is improper to interpret two different laws *in pari materia* where, as here, they serve different purposes, were enacted at different times, and relate to different conduct. *Harris County*, 519 S.W.3d at 122; *Tex. St. Bd. of Chiropractic Exam'rs v. Abbott*, 391 S.W.3d 343, 348-49 (Tex. App.–Austin 2013 no pet.). The TPA was first enacted in 1915, a full half century before the TMWA. *Igal v. Brightstar Info. Tech. Grp., Inc*., 250 S.W.3d 78, 81 (Tex. 2008), *superseded on other grounds by* Tex. Lab. Code § 61.051. The TPA regulates *when* and *how* to pay employees, not *how much* to pay them. *See id.* at 81–82. In contrast to the TMWA, the TPA generally covers any Texas employee of a private employer, and is not limited to those workers not covered by the FLSA or otherwise exempt. *Compare* Tex. Lab. Code § 61.001(3) *with* Tex. Lab. Code § 62.152–62.161. Given these

substantial differences, the meaning of "wages" under the TMWA should not depend on the meaning of "wages" in the TPA.

Third, there is good reason for TPA and the TMWA to define "wages" differently. The TPA's definition of "wages" includes fringe benefits (vacation pay, holiday pay, sick leave pay, parental leave pay, or severance pay) that are "owed to an employee under a written agreement with the employer or under a written policy of the employer." Tex. Lab. Code § 61.001(7)(B). Clearly, if by policy or agreement, benefits are owed to the employee, then they must be paid, and if they are not, an employee may utilize the remedies in the TPA.

Unlike the TMWA, the TPA definition of "wages" does not include items such as the employer's reasonable cost of furnishing an employee's meals and lodgings, as are mentioned in Section 62.053 of the TMWA. The reason is that they are employer-paid credits which may be factored into calculating whether the employee received the minimum wage; they are not amounts owed to an employee. *See Donovan v. Miller Properties, Inc.*, 711 F.2d 49, 50 (5th Cir. 1983) (per curiam) (statutory definition of "wage" in FLSA allows an employer to credit toward its minimum wage obligations "the reasonable cost . . . of furnishing [an] employee with board, lodging, or other facilities" if they are customarily furnished by employer). Under the TPA, an employee is not entitled to receive payment

from the employer for those items because they are costs the employer assumed and paid. Leaving these items out of the TPA's definition of "wages" does not show that the Legislature intended a more expansive definition of "wage" in TMWA. In fact, it shows the two laws serve different purposes.

5. The TMWA's two preemption provisions do not demonstrate the Legislature's intent to preempt an ordinance for paid sick leave with unmistakable clarity.

a. Section 62.0515 does not clearly and unmistakably demonstrate intent to preempt the Ordinance.

Plaintiffs and the State argue the TMWA's reference to "wage" in two different enactments from 2003, read together, show the Legislature intended to preempt cities from passing "any ordinance governing wages," which they say includes a paid sick leave ordinance. Their strained interpretation of these sections reveals no such intent, let alone unmistakably clear intent.

The current version of Section 62.0515, revised in 2003, provides that a minimum wage established in an ordinance is superseded by the state minimum wage. The section heading says it addresses "Application of Minimum Wage to Certain Governmental Entities," suggesting the Legislature did not intend a broad restriction on non-wage matters like paid leave. *TIC Energy and Chemical, Inc., v. Martin*, 498 S.W.3d 68, 75 (Tex. 2016) ("[T]hough a statutory heading does not limit or expand a statute's meaning, the heading can inform the inquiry into the

Legislature's intent."). A bill analysis of H.B. 804 by the House Economic Development Committee explained that the provision was enacted in response to a ballot initiative to raise the minimum wage in Houston to $6.50. *See* House Econ. Dev. Comm., Bill Analysis, Tex. H.B. 804, 78th Leg., R.S. (2003). Section 62.0515(a) preempts a municipality from setting its own minimum wage that is different from the state minimum wage, except in certain listed situations not applicable here. The Ordinance, by contrast, does not establish any wage at all and, accordingly, does not step on the TMWA's toes.

The purpose as expressed in the legislative history further illustrates this point. *See In re Bell*, 91 S.W.3d 784, 785 (Tex. 2002) (court considered object sought to be attained as expressed in bill analysis to assess statutory purpose). According to the House Economic Development Committee, the act would "ensure the uniform application of the federal minimum wage" at the local level and confirms that "the minimum wage established by Section 62.051 . . . supersedes *a minimum wage* established by a municipality." *See* House Economic Development Committee, Bill Analysis (emphasis added). As shown above, the FLSA meaning of "wage," which the TMWA incorporates, does not include fringe benefits like paid sick leave. Therefore, an ordinance regarding fringe benefits, rather than wages, does not threaten the uniformity established by the FLSA or the

TMWA.

b. Section 62.151 does not clearly and unmistakably demonstrate intent to preempt the Ordinance.

Section 62.151 was enacted in 1993 and amended in 2003. As amended, Section 62.151 provides that the TMWA and a municipal ordinance or charter provision "governing wages in private employment, other than wages in a public contract, do not apply" to workers covered by the FLSA. Tex. Lab. Code § 62.151. The State argues Section 62.151 is a broad restriction that shows the legislature intended both State and local governments to get "out of this regulatory space," that is, the space of regulating wages of workers covered by the FLSA. *See* State Appellant's Br. 10. The boundaries of that regulatory space are not as expansive as the State claims, and do not include a non-wage benefit such as paid time off.

The Texas Elections Code shows that not only does the State continue to have an interest in regulating what it defines as "wages," there is also no discord between the TMWA and requiring employers to pay workers for time spent not working. The Code gives employees paid time off from work to vote in an election and imposes penalties on employers who interfere. Tex. Elec. Code §§ 276.001, 276.004. Unlawful retaliation includes subjecting the voter to "a loss or reduction of wages or another benefit of employment." *Id.* § 276.001(a)(2). An employer may not penalize an employee for visiting the polls on election day by imposing "a loss

or reduction of *wages or another benefit of employment.*" *Id.* §§ 276.004(a)(2), 276.004(c) (emphasis added). In short, state law requires an employer give an employee paid time off to vote under certain circumstances, and is not limited to protecting only those workers who are not covered by the FLSA. This statute directly contradicts the State's argument that the FLSA, and the TMWA, forbid such laws and ordinances because they "add wage regulations on top of federal law." *See* State Appellant's Br. 10. A law that "requires employers to *pay* employees for time *not* worked" is not unheard of in Texas, despite the State's claim to the contrary. *See* State Appellant's Br. 4.

C. The Ordinance does not affect minimum wage uniformity because it does not affect wages at all.

The Ordinance was a valid exercise of the City's power of self-government, a prerogative Austin possesses as a home-rule city, as reflected in its charter. CR136-37. No reasonable reading of the TMWA would lead one to conclude that it cannot coexist peacefully with the Ordinance because the Ordinance does not establish a minimum wage. The cases Plaintiffs and the State rely on to show that the Ordinance is preempted are distinguishable.

The case Plaintiffs and the State cite regarding preemption and the need for regulatory uniformity, *Southern Crushed Concrete, L.L.C. v. City of Houston*, has a much narrower holding than they lead this Court to believe. 398 S.W.3d 676 (Tex.

2013). That case involved a permitting dispute where the City of Houston passed an ordinance that required a concrete manufacturer to obtain a city air permit *after* the company had already obtained an air quality permit from the appropriate state agency. Citing the statute which clearly preempted such action by the city, the Court held that the city was forbidden from "nullifying" the permit issued by the state. *S. Crushed Concrete*, 398 S.W.3d at 679. The Court left open the question of whether the city was preempted from regulating the field more restrictively than the state. *Id.* There is no similarly clear preemptive language in the TMWA prohibiting the City's regulation of the benefit of sick leave. Further, the Ordinance does not nullify any action taken by the State, and no permitting decision is countermanded.

Plaintiffs' and the State's argument that the sick leave Ordinance is like the milk delivery ordinance struck down in *Jere Dairy, Inc. v. City of Mount Pleasant* is not an apt comparison. 417 S.W.2d 872 (Tex. Civ. App.—Texarkana 1967, writ ref'd n.r.e.). In that case, the city's stated purpose for its milk delivery ordinance was to establish quality of freshness standards for dairy products—standards higher than those set by state regulations, which was a field specifically preempted by law. *Id.* at 874. Here, the Ordinance establishes no minimum wage, nor has the City announced such a purpose for the Ordinance, so there is no conflict. Plaintiffs'

and the State's argument that the Ordinance does indirectly what the City could not do directly fails. The Ordinance does not require employers to pay any greater wage than what an employee is already paid.

D. The NFIB implicitly concedes the Ordinance is not preempted.

The Legislature can, and frequently does, speak clearly in effectuating the preemption of local regulations, but it did not do so in the TMWA. Because there is no "unmistakable clarity" supporting their preemption argument, Plaintiffs and the State ask the Court to write into the TMWA something that is not there. But it is the Legislature's prerogative to enact statutes and the judiciary's responsibility to interpret them according to the language the Legislature used. *Molinet v. Kimbrell*, 356 S.W.3d 407, 414 (Tex. 2011). That task includes giving effect to a statute's silence on an issue. *See City of Round Rock v. Rodriguez*, 399 S.W.3d 130, 139-40 (Tex. 2013) (citing *Seay v. Hall*, 677 S.W.2d 19, 25 (Tex. 1984) ("While this court may properly write in areas traditionally reserved to the judicial branch of the government, it would be a usurpation of our powers to add language to a law where the [L]egislature has refrained.")).

At the hearing, the trial court heard evidence suggesting even the Plaintiffs doubted their preemption argument. On cross-examination, Ms. Spilman, the lobbyist, was asked about an email she wrote to her group's members in February

shortly before the vote on the Ordinance. Her email advised them:

> "We WILL ask the court to injunct a 'stay' on the city ordinance until we look at [it] from a legal standpoint. Second, NFIB has already been working with Rep. Workman's office . . . . to file legislation next session *that would pre-empt cities* from creating inconsistent labor standards throughout the states, *like paid leave* . . . "

4RR48, App. C[4] (emphasis added).

She explained when she wrote the email she meant when the Legislature met again:

> ". . . in 2019 we would want to pass legislation that would tell cities to stay in their lane and fix potholes, and *we would preempt them from even passing legislation that is outside their jurisdiction*."

3RR113, App. B (emphasis added).

If the TMWA actually preempted a home-rule city's power to pass a paid sick leave ordinance, no "legislation next session" was needed. The lobby group's plan tacitly admits the current state law does not preempt cities in this way. At the least, the trial court could have reasonably interpreted Ms. Spilman's message that way, and concluded it was not the court's role to read terms into the TMWA that were not yet written.

II. The State and Plaintiffs failed to plead and prove a probable, imminent, and irreparable injury.

[4] This document, Defendants' Ex. 5, appears in the Appendix as App. C, with referenced parts highlighted.

To be entitled to injunctive relief, Plaintiffs and the State were required to plead and prove "probable, imminent, and irreparable injury." *Butnaru*, 84 S.W.3d at 204. Plaintiffs and the State have not shown that the trial court committed clear abuse of discretion if it held they failed to meet this required element.

A. Plaintiffs failed to plead and prove they would be irreparably injured as a result of the Ordinance going into effect.

The trial court would not have clearly abused its discretion if it denied injunctive relief on the ground that Plaintiffs failed to show the requisite injury. Despite their claim that paid sick leave benefits would affect their bottom line, Plaintiffs' witnesses conceded the advantages paid sick leave brings to the workplace. Councilmember Troxclair agreed workers would benefit from being able to stay at home when sick rather than coming to work and maybe getting others there sick. 2RR63, App. A. She agreed that earning paid sick leave can have a positive effect on the public health of Austinites. 2RR55, App. A. Mr. Hudson's company LeadingEdge already provided paid time off for staff employees and did so because "we have to do everything we can to retain them." 3RR37-38, App. B. Ms. Spilman agreed paid sick leave "is a good benefit" and one that employees value. 3RR101, App. A. She understood how an employee with paid sick leave might be less likely to quit and believed such "really good benefits" are "what makes a lot of small businesses competitive." *Id.*

The trial court heard all of this testimony. It also had before it information the City Council considered, including a study which projected overall costs and benefits of the Ordinance, showing an average net savings for employers due in part to reduced employee turnover. 4RR1380. As for Plaintiffs' constitutional claims, there was no evidence that their competitors were unionized employers who would have an unfair competitive advantage, or that they faced an administrative subpoena. Their alleged interim injury consisted entirely of increased administrative costs and related operational issues. The trial court could have reasonably concluded that Plaintiffs had not met their burden of proving the Ordinance would probably irreparably injure them.

B. Plaintiffs' projected compliance costs are not irreparable injury.

Three of Plaintiffs' witnesses testified regarding various operational costs the Ordinance would impose. None claimed those projected costs would shut down their business. Mr. Rigdon testified his school "may have to borrow some money" or forego some repairs to meet this year's projected compliance costs. 2RR88-89, App. A. He did not say this would end his business or cause it to lose students or staff beyond testifying that it *could* cause Strickland to raise tuition—*as it has done every year for the past six years*—and that tuition hikes generally cause a small number of students to drop out. 2RR89, 2RR93, 2RR114, App. A.

Complying with governmental regulations is part of doing business, and the accompanying costs affect all businesses. Those costs are not unique to Plaintiffs' businesses and they do not satisfy the standing requirement that injury be particularized or "peculiar" to them. *See Texas Lottery Comm'n v. Scientific Games Int'l, Inc.*, 99 S.W.3d 376, 380 (Tex. App.—Austin 2003, pet. denied). Other jurisdictions which have considered the issue recognize that although a business may incur expenses in complying with the law, such expenses alone do not constitute irreparable injury warranting injunctive relief. *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005) ("[O]rdinary compliance costs are typically insufficient to constitute irreparable harm."); *Am. Hosp. Ass'n v. Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980) ("[I]njury resulting from attempted compliance with governmental regulation ordinarily is not irreparable harm."); *A.O. Smith Corp. v. FTC*, 530 F.2d 515, 527–28 (3d Cir. 1976) ("Any time a corporation complies with a government regulation that requires corporation action, it spends money and loses profits; yet it could hardly be contended that proof of such an injury, alone, would satisfy the requisite for a preliminary injunction."). Plaintiffs' characterization of their projected operational costs as "irreparable damages" is not an apt analogy for purposes of establishing a right to an injunction.

C. The fact Plaintiffs cannot recover their compliance costs as against the City does not make them irreparable injuries.

Plaintiffs likewise failed to show such "injuries" would be irreparable owing to the City's immunity. Plaintiffs cited no Texas law for the proposition that the government's immunity converts purported damages to irreparable injuries for purposes of obtaining an injunction. Under Plaintiffs' theory, an applicant seeking to enjoin the government from enforcing a law would merely need to show that following the law would cost the applicant some amount of money, since that amount could not be recovered as damages. This is not the law in Texas, and the trial court did not abuse its discretion in rejecting this argument.

The only case Plaintiffs cited for the proposition that a bar to a money damages constitutes irreparable injury, *Texas Department of State Health Services v. Holmes*, 294 S.W.3d 328 (Tex. App.—Austin 2009, pet. denied), does not stand for this proposition. In *Holmes*, this Court declined to find a clear abuse of discretion by the trial court in granting injunctive relief where there was evidence the applicant business owner was losing clients and could potentially go out of business as a result of the state's embargo of her laser hair removal device. *See id.* at 334. *Holmes* simply affirmed that harms which are difficult to quantify, such as a company's loss of clientele and "office stability," may constitute irreparable injuries warranting an injunction. *See id.* In *Holmes* this Court did not cite the

unavailability of money damages against the State as proof of irreparable harm warranting injunctive relief.

D. Plaintiffs' alleged Constitutional violations do not constitute *per se* irreparable injury.

The trial court did not err in disregarding Plaintiffs' claim of *per se* irreparable injury based on alleged Constitutional violations. Not all alleged deprivations of Constitutional rights give rise to *per se* irreparable injury. *See Public Util. Comm'n v. City of Austin*, 710 S.W.2d 658, 661–62 (Tex. App.—Austin 1986, no writ) (holding alleged denial of due process does not give rise to *per se* irreparable injury). The mere invocation of "Constitutional rights" does not alone establish irreparable harm.

Generally, it is only where a party is being deprived of the ability to exercise a First Amendment right that courts have held such injury to constitute *per se* irreparable harm. *See Iranian Muslim Org'n v. City of San Antonio*, 615 S.W.2d 202, 204–05, 208 (Tex. 1981) (denial of a permit to demonstrate against former Shah of Iran); *Sw. Newspaper Corp. v. Curtis*, 584 S.W.2d 362, 365 (Tex. Civ. App.—Amarillo 1979, no writ) (denial of equal access to public information to certain, media organizations). The court's holding in *Iranian Muslim*, a case Plaintiffs cite, limited the *per se* irreparable injury theory to cases where "a constitutional right of free speech *was being stifled*." *Iranian Muslim*, 615 S.W.2d at 208 (emphasis added).

This principle has not been expanded to include instances where an injunction applicant claims it will incur costs complying with a regulation. For the trial court to interpret those cases otherwise would have pioneered a new frontier of government litigation without clear and controlling legal authority.

Factually, this case is distinguishable. Plaintiffs are not students being deprived of their constitutional right to peacefully protest. Nor are they news outlets being denied equal access to public information. Plaintiffs are business owners and their trade groups who, having failed to win their policy preferences at the City Council level, now seek to enjoin a duly-enacted Ordinance until they can get a legislative fix. 4RR48. And while Plaintiffs cast one of their claims as a freedom of association claim, which is grounded in the First Amendment, the Ordinance provision they challenge on this ground *does not* prevent them from exercising their associational rights. There is no obvious abridgment of First Amendment-type freedoms nor, for that matter, any other constitutional guarantees. The trial court would not have committed a commit a clear abuse of its discretion if it rejected Plaintiffs' theory of *per se* constitutional injuries as ground for temporary injunctive relief.

E. Plaintiffs' alleged injuries were speculative and hypothetical.

For purposes of a temporary injunction, it is not enough for injury to be

irreparable; it must also be probable and imminent. *See Butnaru*, 84 S.W.3d at 204. Plaintiffs' argument as to this point was that the Ordinance was to go into effect on October 1, 2018, nearly three months after the hearing. At the time of the hearing, Mr. Rigdon's school had spent nothing preparing to comply with the Ordinance. 2RR106-07, App. A. There was no proof LeadingEdge had spent any money, either. The only testimony regarding actual spending was from Ms. Spilman, who testified that an NFIB member restaurant owner (whom she refused to name) had already spent $30,000 to $40,000 complying with the Ordinance, but that she herself had no personal knowledge of any of those dollar amounts other than what "my member said." 3RR122, 124, 126, App. B. Presumably, NFIB's mystery member could have been subpoenaed to give the court direct testimony substantiating his claims, but that did not happen. The trial court would not have clearly abused its discretion if it gave Ms. Spilman's unattributed, second-hand hearsay account the weight it deserved.

F. The testimony must be reviewed in the light most favorable to the trial court's ruling, not the other way around.

Plaintiffs' characterization of the testimony cited on Pages 42-44 of their brief is not entirely accurate and gives a selective and misleading impression of the evidence. Most of the points Plaintiffs attempt to make in their brief regarding the testimony were not so clearly expressed by their witnesses. Review of the transcript

establishes the following:

- Plaintiffs claim Strickland School will be "forced to expend staff time and resources" to educate employees on compliance, but do not purport to explain exactly what that expenditure is and how it would irreparably harm the school. What Mr. Rigdon actually said was that he would "probably have to spend some time on it" and "probably have to pay my accounts manager extra to do that, to set that up for us." 2RR84-85, App. A. Plaintiffs cite no testimony of what the school's out-of-pocket cost would be or how one monetizes "spending time" preparing one's staff to comply with the Ordinance.
- The purported difficulty the school faced in "changing policies" was that when the school's teachers, who already had paid leave under the school's existing policy, returned for the fall semester, Mr. Rigdon believed they would have to change to a new policy in October and "it would be just very difficult as far as them understanding and even us understanding." 2RR86, App. A. His speculation was not proof of immediate and irreparable injury.
- As for the claim that the Ordinance would cause the school to "expend thousands in funds not budgeted," what Mr. Rigdon actually said was he believed it would cost the school "in the neighborhood of $1,500 to $2,000"

in the coming year to employ substitute teachers when those on staff used their sick leave. 2RR88, App. A. This estimated cost averages to $166 per month for the school on the high end. Although Mr. Ridgon said this amount was not in this year's budget, there was no evidence this modest amount threatened the school's solvency or posed a threat of immediate and irreparable injury, especially for a school that can afford to charge 30% less than its competitors. 2RR92-93, App. A.

- As for Plaintiffs' claim that the Ordinance would require LeadingEdge to hire a new employee at around $60,000 salary just to handle the administration and paperwork, Mr. Hudson testified it was his preference to hire a new employee for that task instead of using an outside vendor because "I like the control of it" and "I don't like to pay an outside service to do it." 3RR59, App. B. This is a business decision by Mr. Hudson, not something the Ordinance required his company to do. Even so, the hypothetical new employee's projected salary is only 10% of the company's $600,000 net profit from last year. 3RR42, App. B. There was no evidence this projected expense threatens the company's solvency or would cause irreparable harm.

- As for reprinting LeadingEdge's employee handbooks before the Ordinance goes into effect, Mr. Hudson said the printing cost was only about $1,000, and the handbooks are reprinted yearly anyway. 3RR13, 43, App. B. Furthermore, at the time the handbooks were printed this year, Mr. Hudson was aware the Ordinance required information about paid sick leave be included, but he "didn't think about putting it in the handbook honestly, but now we need to do that." 3RR61, App. B.
- As for LeadingEdge's need to purchase "specialized software" to track employee accrual of sick leave, the company already has software that tracks the hours employees work, but Mr. Hudson did not know how the software works. 3RR63, App. B. When asked if that software could be updated to track one hour of accrued sick leave for every 30 hours worked, Mr. Hudson answered "I hope so." 3RR64, App. B. Even if new, specialized software were needed, the witness gave no testimony regarding the estimated cost to purchase it. He agreed that updating the software would involve "training of some type" for his staff, but was not sure of the details. 3RR17, App. B.
- Mr. Hudson *did not* testify that his company would implement "an across-the-board rate hike" for its services because of the Ordinance. He said that from his "preliminary looking into it" based on talking to others outside

Texas, it seemed a "hike in rates is the way to go." 3RR19, App. B. He added "that's all kind of guesswork right now." 3RR28, App. B. But he noted when the company recently increased its rates by 25% in order to hire an employee to oversee complying with the Affordable Care Act, LeadingEdge "got a little bit of a pass," presumably because its competitors also raised their rates. 3RR31, App. B. Mr. Hudson did not know if the Ordinance would affect his company in a way that it did not affect its competitors. 3RR65, App. B.

- Mr. Hudson *did not* testify that paying his 400+ temporary employees for one day of sick leave would create an annual cost to the company of $115,000. Rather, he estimated "that would cost us about $55,000." 3RR20, App. B. His estimate was based on the assumption that each of the company's approximately 465 Austin temporary employees who worked more than 80 hours last year would each earn, qualify for, and use a full-day's sick leave benefit at the rate of $15 per hour. *Id.* But that estimate assumed each of those 465 employees would work for LeadingEdge at least 240 hours in a year, which is the time an employee must work in order to accrue eight hours of sick leave under the Ordinance. Although his company sued the City and had ample time to prepare for the hearing, Mr.

Hudson "couldn't even guess" how many of those 465 temporary employees worked at least 240 hours in Austin last year, even though the company keeps such records. 3RR40-41, App. B. His estimate is unreliable since turnover is high among the temporary employees, most of whom only work for the company "weeks to months." 3RR39, App. B.

- Mr. Hudson *did not* testify that LeadingEdge would have to stop paying employee group health insurance premiums and drop paid holidays for administrative staff. He said these are things "we're looking at" and "if this goes into a very expensive ordeal" perhaps "eliminating some positions." 3RR22, App. B. His testimony about what the company *might* do was speculative and hypothetical, not proof of immediate and irreparable injury.
- Mr. Hudson *did not* testify the Ordinance would force his company to borrow money at a higher rate or reduce its available credit line. When asked how the Ordinance would affect his company's ability to obtain and use credit, he answered, "I don't know. I'm . . . I'm guessing at that[,]" and added, "I'm going to have to talk to the bank and see how they will look at it." 3RR51-52, App. B. This is hardly clear evidence of irreparable injury.

This Court must review that evidence in the light most favorable to the trial court's order, indulging reasonable inferences in its favor. *See EMSL Analytical,*

Inc. v. Younker, 154 S.W.3d 693, 696 (Tex. App.—Houston [14th Dist.] 2004, no pet.). With respect to the resolution of factual issues, an appellant must establish the trial court reasonably could have reached only one decision. *Emeritus Corp. v. Ofczarzak*, 198 S.W.3d 222, 225–26 (Tex. App.—San Antonio 2006, no pet.). In considering the evidence, this Court cannot substitute its own judgment for that of the trial court, even if it would have reached a contrary conclusion. *Greenpeace, Inc. v. Exxon Mobil Corp*., 133 S.W.3d 804, 808 (Tex. App.—Dallas 2004, pet. denied). Plaintiffs are not entitled to have this Court to review the testimony in the light most favorable to support their argument. Based on this record, the trial court would not have clearly abused its discretion if it concluded that Plaintiffs presented insufficient evidence of immediate and irreparable injury.

G. The State neither pleaded nor proved a probable, immediate and irreparable injury.

The Attorney General called not one of the 28 million people residing in Texas to substantiate its claim that the State faces imminent and irreparable injury if Austin workers are permitted to earn paid sick leave under the Ordinance. Like the Plaintiffs, the State had ample time to prepare witnesses and determine what evidence existed to substantiate its claim of irreparable injury. For whatever reason, the State chose to do none of that and instead relied entirely on its unsworn pleading rather than evidence at the hearing.

Having presented no evidence whatsoever of irreparable injury, the State now makes the legal argument that because it is a sovereign, its interest in its own sovereignty is enough to satisfy the irreparable injury requirement for obtaining a temporary injunction. It is not. The State is not exempt from the rules all litigants must follow when seeking relief in court. *See State v. Naylor*, 466 S.W.3d 783, 792 (Tex. 2015) ("[T]he State must abide by the same rules to which private litigants are beholden."). The requirement that a temporary injunction petition must plead and prove irreparable harm is no different.

The authority the State cites in support of this claim of irreparable injury is inapposite. Footnote 17 in the U.S. Supreme Court's opinion in *Abbott v. Perez* did not establish a new standard for the State proving irreparable harm. 138 S. Ct. 2305, 2324 n.17 (2018). Rather, the Court noted that a trial court's effective injunction barring the State from conducting a scheduled election using maps issued by the Legislature irreparably harmed the State. In this case, the Attorney General is not claiming any court-ordered interference with state laws, and the trial court enjoined nothing. In this respect, the circumstances more closely resemble those in *New Mexico Dep't of Game & Fish v. United States*, where the state sued a federal agency to stop a program for releasing wolves within state borders. 854 F.3d 1236 (10th Cir. 2017). The Court reversed the trial court's order granting

the state's preliminary injunction request because the state failed to establish a risk of irreparable injury under federal law. In rejecting the state's "sovereignty" argument, the same the Attorney General makes in this case, the Court noted that New Mexico ". . . has not been enjoined from establishing, enforcing, or effectuating any of its statutes." *Id.* at 1254. The City of Austin's Ordinance cannot be reasonably construed to render the state minimum wage a nullity, and it does not threaten to restrict the State from doing anything it is authorized to do by law.

The Legislature may grant standing to a state attorney general to bring suit for injury done to its citizens, but has not done so here. As discussed in the Appellee's opening brief, the Attorney General has no authority to enforce compliance with the TMWA. The Attorney General may view the City's paid sick leave Ordinance as bad policy, but that opinion does not entitle the State to the extraordinary remedy of an injunction. The trial court could have reasonably reached the same conclusion without clearly abusing its discretion.

III. Plaintiffs failed to plead and prove valid Constitutional claims and a probable right to the relief sought on those claims.

A. Plaintiffs failed to plead and prove Constitutional claims.

Plaintiffs likewise failed to meet their first burden on a request for injunctive relief: to plead and prove a cause of action. *See Butnaru*, 84 S.W.3d 204. Plaintiffs failed to show that they had standing to sue on their asserted causes of action and

that their claims were sufficiently ripe for the court's jurisdiction to be properly invoked. *See* Cross-Appellants' Opening Br. 11–34. They further failed to overcome Defendants' sovereign immunity. *Id*. Although this ground was not, apparently, the basis on which the trial court denied injunctive relief, Plaintiffs nonetheless failed to meet it. *See City of San Antonio v. Summerglen Property Owners Ass'n*, 185 S.W.3d 74, 90 (Tex. App.—San Antonio, pet. denied) (vacating order granting temporary injunction and reversing denial of plea to the jurisdiction due to lack of standing).

B. Plaintiffs failed to plead and prove a probable right of recovery on their Constitutional claims

1. No probable right of recovery on Plaintiff's due course of law claim.

Plaintiffs failed to carry their burden to show a probable right of recovery on their as-applied due course of law claim. When challenging an economic regulation on as-applied substantive due process grounds, to overcome the presumption of constitutionality, a plaintiff must show either (1) the law could not arguably be rationally related to a legitimate governmental interest; or (2) when considered as a whole, the law's actual, real-world effect as applied to the challenged party could not arguably be rationally related to, or is so burdensome as to be oppressive in light of, the governmental interest. *Patel v. Tex. Dep't of*

Licensing and Regulation, 469 S.W.3d 69, 88 (Tex. 2015). This is a high standard, and courts must "extend great deference to legislative enactments, apply a strong presumption in favor of their validity, and maintain a high bar for declaring any of them in violation of the Constitution." *Id*. at 91.

Patel illustrates the required level of proof. In *Patel*, a group of professional eyebrow threaders sued the State charging its cosmetology scheme was unconstitutional as applied. *Patel*, 469 S.W.3d at 74. Plaintiffs took issue with the requirement that they attend a 750-hour training program and pass examinations in order to do their work. *Id*. at 88. The record reflected substantial training costs to the threaders which caused them to "lose the opportunity to make money actively practicing their trade" while they attended the lengthy training and took exams. *Id.* at 90. The threaders argued the requirements, at least as applied to them, had no rational connection to the State's stated interest in "reasonable safety and sanitation requirements[.]" *Id*. They pointed to evidence that few of the required training hours related to hygiene and sanitation and only about half of the training hours were even arguably relevant to threaders. *Id*. at 89. The threaders conceded that the licensing scheme generally was "rationally related to a legitimate governmental interest," *see id*. at 87, and so the first prong was not at issue, but the Court agreed that they met their high burden to prevail under the second prong.

Although *Patel* involved the summary judgment standard, which is different from the standard on a temporary injunction, the evidence Plaintiffs proffered at the hearing in this case was nowhere near that offered by the *Patel* threaders which overcame the presumption of constitutionality. There was no evidence the Ordinance would force any Plaintiff to shutter their business or prevent them from practicing their profession. *See Tex. Alcoholic Beverage Comm'n v. Live Oak Brewing Co., LLC*, 537 S.W.3d 647, 657 (Tex. App.—Austin 2017, pet. filed) (rejecting due course of law claim where there was no demonstration that challenged law deprived the plaintiffs of occupational freedom). Plaintiffs offered no clear evidence of their expected "injury," only speculation.

Perhaps acknowledging their failure to meet their evidentiary burden, Plaintiffs argue the City failed to meet it. But it was the Plaintiffs' burden, not the City's, to establish a probable right of recovery. *Patel* suggested no burden-shifting on the elements of a due course of law claim, and a governmental entity "has no obligation to produce evidence to sustain the rationality" of its law. *See Lens Express, Inc. v. Ewald*, 907 S.W.2d 64, 69 (Tex. App.—Austin 1995, no writ). To the extent the purpose and benefits of the Ordinance were considered, the legislative record supported the City Council's findings in the Ordinance as to the protection of public health and other interests.

2. No probable right of recovery on Plaintiff's equal protection claim.

The trial court did not err in determining Plaintiffs did not establish a probable right of recovery on their equal protection claim. The challenged provision of the Ordinance is a so-called "opt out" provision that allows workers who collectively bargain the freedom to contract around the minimum benefit standard the Ordinance requires. Such "opt out" provisions are commonplace. *See Livadas v. Bradshaw*, 512 U.S. 107, 130–31, 114 S. Ct. 2068, 2082, 129 L. Ed. 2d 93 (1994) (discussing "familiar and narrowly-drawn opt-out provisions" which allow employers to contract around state minimum labor standards through collective bargaining agreements). The reason the law allows waiver or modification of the protection of the minimum standard through a collective bargaining agreement is because, under those circumstances, the worker is sufficiently protected. *See* 29 U.S.C. § 102 (noting that "the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment"). The challenged Ordinance provision easily passes rational basis review. *See Klumb v. Houston Mun. Employees Pension Sys.*, 458 S.W.3d 1, 13 (Tex. 2015); *see also Viceroy Gold v. Aubry*, 75 F.3d 482, 490 (9th Cir. 1996) (upholding statute permitting only unionized mining workers to work more than eight-hour days against equal

protection challenge).

3. No probable right of recovery on Plaintiffs' freedom of association claim.

Plaintiffs failed to establish a probable right of recovery on their freedom of association claim. No such right held by Plaintiffs was implicated. As explained in the City's opening brief, Plaintiffs lack standing to the extent they attempted to assert such a right on behalf of their employees. *See Mass. Indem. and Life Ins. Co. v. Tex. State Bd. of Ins.*, 685 S.W.2d 104, 113 (Tex. App.—Austin 1985, no writ) (holding insurance company, as the employer, lacked standing to assert equal protection claim on behalf of part-time insurance agents).

Assuming Article I, Section 27 of the Texas Constitution is coextensive with the protections afforded by the First Amendment, the First Amendment protects expression, not conduct, unless the conduct is expressive. *U.S. v. O'Brien*, 391 U.S. 367, 376, 88 S. Ct. 1673, 1678, 20 L. Ed. 2d 672 ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."). Similarly, the associational conduct protected by the First Amendment is a "First Amendment right of expressive association." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644, 120 C. Ct. 2446, 2449, 1678 147 L. Ed. 2d 554 (2000) (emphasis added). Plaintiffs offered no evidence of any expressive act on their part. Rather, Plaintiffs

witnesses merely noted that their workplaces, or the workplaces of their member employers, were not unionized. 2RR10, 3RR76, 82. This predictable state of affairs is not expressive conduct for constitutional purposes.

Nor are Plaintiffs engaged in any sort of association which triggers First Amendment protections. The First Amendment right of freedom of association protects a "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U. S. Jaycees*, 468 U.S. 609, 622, 104 S. Ct. 3244, 3252, 82 L. Ed. 2d 462 (1984). While every member of the associational group need not agree on every issue for the group's policy to constitute "expressive association," *see Dale*, 530 U.S. at 655–56, there still must be some sort of policy or some other "political, social, economic, educational, religious, [or] cultural end[]" collectively being advanced. *See Jaycees*, 468 U.S. at 622. Plaintiffs argue in their brief—without citing the record —that "Appellants and their employees are . . . united in supporting a non-unionized workforce." Pls. Appellants' Br. 49. The fact Plaintiffs are not unionized employers is hardly proof that their employees support that choice or that Plaintiffs and their employees are working together to further a shared cause against unionization. It may well be that these workplaces are not unionized only because Plaintiffs' employees have not yet organized, and not because they oppose unions. The record evidences no

expression or expressive association by Plaintiffs, or at least nothing the Texas Constitution protects.

For similar reasons, Plaintiffs' claim that the challenged provision of the Ordinance amounts to an unconstitutional condition fails. Plaintiffs presented no evidence that they, or any other unionized or non-unionized employers, are exercising any Constitutional right simply by having a unionized or non-unionized workplace. The unconstitutional conditions doctrine requires constitutional rights to be at stake in order to be triggered. *See Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 606, 103 S. Ct. 1997, 2001, 186 L. Ed. 2d 697 (2013) (noting that "the government may not deny a benefit to a person because he exercises a Constitutional right") (emphasis added). The trial court would not have clearly abused its discretion if it determined that Plaintiffs were not entitled to a temporary injunction on this ground.

4. No probable right of recovery on Plaintiffs' warrantless search and seizure claim.

Plaintiffs failed to plead and prove a probable right of recovery on their warrantless search and seizure claim. They challenged the Ordinance's administrative subpoena process, but offered no evidence they had been served with such subpoena or even anticipated being served. Further, the complained-of provision (if not the entirety of the Ordinance) is penal but Plaintiffs never alleged

or established that its enforcement threatened irreparable injury to vested property rights. The Court lacked jurisdiction to decide this claim. *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 852 (Tex. 2000); *State v. Morales*, 869 S.W.2d 941, 942 (Tex. 1994).

Even if the trial court had jurisdiction, Plaintiffs failed to establish a probable right of relief. U.S. Supreme Court Fourth Amendment jurisprudence guides interpretation of Article I, Section 9 of the Texas Constitution. *See Johnson v. State*, 912 S.W.2d 227, 234 (Tex. Crim. App. 1995 (en banc) (plurality op.). The Supreme Court has explained that on-demand warrantless inspection requests violate the Fourth Amendment because there is no opportunity for pre-compliance review. *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2452, 192 L. Ed. 2d 435 (2015); *See v. City of Seattle*, 387 U.S. 541, 544–45, 87 S. Ct. 1737, 1740, 18 L. Ed. 2d 943 (1967). In other words, "while the demand to inspect may be issued by the agency, in the form of an administrative subpoena, it may not be made and enforced by the inspector in the field[.]" *See,* 387 U.S. 544–45.

The challenged provision of the Ordinance does not authorize on-demand records requests. Instead, it requires that an employer be given at least 10 business days after service of an administrative subpoena in which to comply—a lag time which permits employers ample time to challenge the subpoena in district court.

4RR8, § 4-18-7(E). On its face, then, there is no Article I, Section 9 problem with this provision of the Ordinance. Indeed, the fact that the Ordinance requires issuance of an administrative subpoena suggests that there is no constitutional problem at all. *Patel*, 135 S. Ct. at 2454 ("Of course, administrative subpoenas are only one way in which an opportunity for pre-compliance review can be made available."). Moreover, even if this claim (and Plaintiffs' freedom of association and equal protection claims) were properly brought and the relevant provisions found unconstitutional, those circumstances would not have entitled Plaintiffs to enjoin enforcement of the entire Ordinance. This is because of the City Code's severability clause. City of Austin, Tex. Code § 1-1-12 (providing for severability of provisions of the City Code); *City of Houston v. Bates*, 406 S.W.3d 539, 549 (Tex. 2013) (express severability clause prevails when interpreting an ordinance). The trial court could have reasonably concluded Plaintiffs had not proven a probable right to recover.

IV. The equities disfavored temporary injunctive relief.

Whether to grant injunctive relief necessarily involves a balancing of equities by the trial court. As the Texas Supreme Court has explained, "[a] request for injunctive relief invokes a court's equity jurisdiction . . . [a]nd when exercising such jurisdiction, a court must, among other things, balance competing equities." *In re Gamble*, 71 S.W.3d 313, 317 (Tex. 2002). Consideration of the equities

involves weighing the public interest against the injury to the parties from the grant or denial of injunctive relief. *Int'l Paper Co. v. Harris C'nty*, 445 S.W.3d 379, 395 (Tex. App.—Houston [1st Dist.] 2013, no pet.). If the trial court finds that "the injury to the complainant is slight in comparison to the injury caused the defendant and the public. . . relief will ordinarily be refused." *Storey v. Cent. Hide & Rendering Co.,* 226 S.W.2d 615, 618–19 (Tex. 1950) (internal quotation omitted) (discussing equity-balancing in context of enjoining nuisance).

A. The balance of equities favored not enjoining the Ordinance.

Plaintiffs' purported harms amounted to projected increases in business operational costs, which were speculative at best. The State put forth no evidence of irreparable harm at all. On the other hand, the potential harm to Austin workers and the public in general from indefinitely delaying the Ordinance—including public health costs associated with sick employees going to work rather than staying home—were not insignificant. As discussed above, Plaintiffs' witnesses admitted paid sick leave is a valuable benefit to workers which could have a positive effect on individuals and the public health of Austinites. These admissions are consistent with the findings the city made in the Ordinance. 4RR6; Part 1.

Equity required the trial court to weigh these competing interests. The court could have reasonably concluded the balance tipped against the injunction. *Cf. Int'l*

Paper, 445 S.W.3d at 395–96 (no error in denying injunction against prosecution of case by contingent-fee lawyers for reasons including that such arrangements benefitted the public); *Joseph v. Sheriffs' Ass'n*, 430 S.W.2d 700, 704 (Tex. Civ. App.—Austin 1968, no writ) (no abuse of discretion in denying injunction where "appellee would suffer more by an improper grant of an injunction than appellant would suffer from an improper denial of an injunction").

B. Equity disfavored judicial activism by the trial court.

The political dimension of the injunction the Plaintiffs and the State sought cannot be ignored. NFIB's stated objective was to have a court stay the Ordinance until a new preemption law could be enacted by the Legislature next year. 4RR48, App. C. Legislative prerogatives, like those the NFIB described, are best left to the that branch of the government. A court should be particularly cautious of "interference by injunction with the legislative functions of a municipal corporation," since "[t]he enactment of an ordinance by the legislative body of a city is a sovereign act of government." *City of Dallas v. Couchman*, 249 S.W. 234, 239 (Tex. Civ. App.—Dallas 1923, writ ref'd). This is because cites "are endowed with important governmental functions, which more intimately affect their inhabitants in the ordinary concerns of life than probably any other government agency does." *Id.* at 240. Faced with this issue, the trial court could have

reasonably avoided the brand of judicial activism Appellants proposed, and instead concluded, as was the court's discretion, that equity weighed against an injunction while Plaintiffs lobbied for a new law in the next legislative session.

V. The trial court did not err in admitting the City's exhibits into evidence.

A. There was no reversible error.

A party seeking to reverse a judgment based on erroneous admission of evidence must prove the evidence probably resulted in rendition of an improper judgment, which usually requires the complaining party to show that the judgment turns on the particular evidence excluded or admitted. Tex. R. App. P. 44.1(a)(1); *Barnhart v. Morales*, 459 S.W.3d 733, 742 (Tex. App.—Houston [14th Dist.] 2015). Plaintiffs did not establish that the trial court's denial of the temporary injunction turned on evidence contained in Defendants' Ex. 6A & 6B. Even if the trial court's evidentiary rulings were error, this point must be denied because it was not shown to be reversible. Nevertheless, the trial court did not err.

B. Denying Plaintiffs' voluminous records objection was no error.

The fact the trial court admitted so-called "voluminous records" does not amount to an abuse of discretion. Plaintiffs do not deny receiving copies of the documents the day before, as they were attached to the City's trial brief, and they

clearly had time enough to review them to prepare a written objection. Supp.CR56-2445. The decision to admit or exclude evidence lies within the sound discretion of the trial court. *Bay Area Healthcare Grp., Ltd. v. McShane*, 239 S.W.3d 231, 234 (Tex. 2007). Plaintiffs do not specify how that sound discretion was abused.

This was not a proper basis for objection. None of the cases Plaintiffs cite involved a challenge to the admission or denial of evidence, or the trial court's abuse of discretion. For example, in *Eaton Metal Products, L.L.C. v. U.S. Denro Steels, Inc*., which the Plaintiff cited at trial and in their brief, the appellate court upheld an order granting summary judgment in a breach of contract case where the challenging party's evidence included an exhibit of more than 700-pages of undifferentiated documents which the party argued "clearly establish . . . a contract." No. 14-09-00757-CV, 2010 WL 3795192, *6 (Tex. App.—Houston [14th Dist.] Sept. 30, 2010, no pet). Neither that case nor the others cited addressed the abuse of discretion standard for evidentiary rulings.

C. Denying Plaintiffs' untimeliness objection was not error.

The two exhibits were self-authenticating certified copies of public records under Texas Rule of Evidence 902(4), and also self-authenticating business records under 902(10). 3RR150-152; 4RR51-52. Plaintiffs' argument that the two exhibits

did not qualify as self-authenticating business records because they were not timely served under Texas Rule of Evidence 902(10)(A), ignores the other basis of authentication and also the "good cause" exception to the 14-day service requirement for business records. *Id*. At the hearing, the City's counsel explained that the documents had been available to Plaintiffs on the City Clerk's website and copies were provided to them the day before. 3RR150-52. Even if the documents were not self-authenticating public records, the court could have reasonably concluded that good cause existed to admit the exhibits as business records without abusing its discretion.

D. No error in denying Plaintiffs' objections regarding incompleteness, hearsay and relevance.

Plaintiffs argue the trial court erred because the documents were incomplete, contain hearsay, and are irrelevant, citing Texas Rules of Evidence 403, 801 and the *Patel* opinion. As to the incompleteness objection, the document Plaintiffs claim was missing, an undated letter from the Austin Chamber of Commerce, was offered and admitted. 3RR154. Texas Rule of Evidence 107 permits this practice. When one party believes a missing document will allow the fact-finder "to fully understand the part offered," the missing document may be admitted. *Id*. There was no error.

Regarding Plaintiffs' hearsay objection, they directed the trial court to no

specific documents they contend are inadmissible hearsay. The documents in the two exhibits include transcripts of City Council meetings, documents and reports generated in the City's stakeholder process, and postings from the City Council Message Board regarding the Ordinance. 4RR51-52. These documents were not offered for the truth of the matters asserted, but to show the information the Mayor and City Councilmembers, including Councilmember Troxclair, had before them when they voted on the Ordinance. They are not hearsay under Texas Rule of Evidence 803(d).

Regarding the relevance objection, Plaintiffs alleged the City's governmental interests were "factually unsupported" and the Ordinance had "no rational connection" to those interests. CR114. Their first witness, Councilmember Troxclair, testified that, in her view, she was presented with no "data, facts or evidence" supporting the findings in the Ordinance. 2RR41. Clearly, information in the exhibits was relevant to the points Plaintiffs tried to make at the hearing.

CONCLUSION AND PRAYER

The Court should affirm the trial court's order denying the extraordinary relief of a temporary injunction because no clear abuse of discretion has been shown.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Tex. R. App. P. 9.4, I hereby certify that this brief contains **14,680** words, excluding the portions of the brief exempted by Rule 9.4(i)(1). This is a computer-generated document created in Microsoft Word, using 14-point typeface for all text, except for footnotes which are in 12-point typeface. In making this certificate of compliance, I am relying on the word count provided by the software used to prepare the document.

/s/ Paul Matula
Paul Matula

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing ***Appellees Response Brief*** has been delivered via electronic filing and to all other counsel of record, as listed below, on this, the 6th day of September, 2018.

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APPENDIX

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Excerpts from Vol. 2 of the Reporter's Record	A
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Excerpts from Vol. 4 of the Reporter's Record	C

TAB A

REPORTER'S RECORD

VOLUME 2 OF 4 VOLUMES

TRIAL COURT CAUSE NO. D-1-GN-18-001968

APPELLATE CAUSE NO. 03-18-00445-CV

TEXAS ASSOCIATION OF BUSINESS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, AMERICAN STAFFING ASSOCIATION, LEADINGEDGE PERSONNEL, LTD., STAFF FORCE, INC., HT STAFFING LTD, D/B/A THE HT GROUP and THE BURNETT COMPANIES CONSOLIDATED, INC., D/B/A BURNETT SPECIALISTS; SOCIETY FOR HUMAN RESOURCE MANAGEMENT; TEXAS STATE COUNCIL OF THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT, AUSTIN HUMAN RESOURCE MANAGEMENT ASSOCIATION, STRICKLAND SCHOOL, LLC; AND THE STATE OF TEXAS, Plaintiffs, V. CITY OF AUSTIN, TEXAS; STEVE ADLER, MAYOR OF THE CITY OF AUSTIN, AND SPENCER CRONK, CITY MANAGER OF THE CITY OF AUSTIN, Defendants.	§	IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS 459TH JUDICIAL DISTRICT

PETITIONS IN INTERVENTION

On June 25, 2018, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable Tim Sulak, Judge presiding, held in Austin, Travis County, Texas;

Proceedings reported by machine shorthand.

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to present to Your Honor, and the issues, the legal issues are thoroughly briefed, as you already mentioned.

THE COURT: Well, and the legal issues are -- are well briefed, but they are very complex, and some of which would be dispositive or determinative of some of the other matters that are set. And so that's always an interest of mine is if we take up one at the outset that's dispositive of two, we cut the time down considerably. Alternatively, if we take that dispositive one up last, we've heard all those things in advance that we don't have any reason to rule upon.

I don't know that I can rule on anything from the bench today. I'll certainly give it my best shot, but I am curious about efficiencies and economies if we're going to be putting on evidence or putting on arguments of matters that would be mooted or would be otherwise disposed of by ruling on some of the other motions.

Have you given any consideration to that?

MR. HENNEKE: I have, Your Honor. Your Honor, I've had the great privilege of being before you and your Court here before on some of these other type of public interest matters. I think we can recognize that a lot of these issues will ultimately be addressed by the appellate courts, and just understand that that's how it

works.

So I think the challenge for us today is to figure out the most efficient way to move this process along to the next steps. But within that, I would frame for the Court the need to preserve the status quo, and the on-the-ground issue that we have here with the ordinance already in place with businesses looking at what they have to do to prepare to comply incurring costs now with the confusion about the conflict with state law and the potential preemption issues, and then the upcoming October 1 deadline where then it begins to be enforced. So there's injury being suffered, which is why we want to present our TI hearing to the Court and have that matter addressed.

So what I think the most -- the best way would be to proceed forward would be for this Court to take -- to look to take action on three proceedings. For the Court to look to take action on the temporary injunction motion in order to address whether it's necessary to preserve the status quo pending the outcome of the litigation we believe that it is.

The second matter would be for this Court to act on our plaintiff and the State of Texas' motion to strike against the defendant intervenors, however, and to grant that motion, which will afford them the opportunity

Q. I don't believe you and I have ever met, although you and I worked together in City Hall; is that right?

A. Yes.

Q. Okay. Is it my understanding that you were opposed to this ordinance that was there in front of you as Exhibit Number 1?

A. I voted against the ultimate adoption of this ordinance, yes.

Q. And you voted against this ordinance because you were opposed to it.

A. I voted against the ordinance because we just received it that day, and I didn't have the information that I needed to make an informed decision about it.

Q. So is that why you were opposed to it?

A. Yes.

MR. HENNEKE: Objection. Assumes facts not in evidence.

THE COURT: This is cross-examination of an adverse party's witness, and we'll allow some latitude. You'll have an opportunity to redirect if necessary.

Q. (BY MR. MATULA) well, is it -- would you agree with me that when the City Council of Austin votes on a certain matter, they do so as a body?

A. Yes.

Q. And when the City Council voted on this

A. I don't -- I guess it was -- I guess it's possible. We take -- we take about a hundred votes at every council meeting, and sometimes if you have to use the restroom or --

Q. I understand.

A. -- do something else, you're not on the dais, so -- so I'm not -- I don't recall.

Q. Thank you.

One of the statements here on this resolution City Council passed directing that there be a stakeholder process, on page 1 there it says: "Whereas, earning paid sick leave time can have a positive effect on individuals and public health of Austinites by allowing workers a limited number of hours per year to care for themselves or a close family member when illness strikes or medical needs arise."

Do you see that?

A. I'm sorry, was that on the first page?

Q. Yes, ma'am, that's -- it's the second paragraph of the first page where it says "whereas."

A. Okay. Yes.

Q. Do you agree or disagree with that statement? Or do you not have an opinion at all?

A. I'm sorry, just give me a minute to read it.

Q. Okay.

A. Yeah, the -- it says -- it uses the word "can," so it's permissive. So it can have a positive effect or it cannot have a positive effect, so -- so I guess I would agree with the general premise of the statement.

Q. Okay. So generally earning paid sick leave can have a positive effect on public health of Austinites.

A. Sure.

Q. Okay. A couple more questions about this resolution, and I know you may not remember it and you don't recall voting on it, and it's okay if you don't remember that.

But on page 2 up at the top, if you can get it in front of you.

A. Uh-huh.

Q. It says: "Whereas, a study conducted by the Institute for Women's Policy Research, approximately 37 percent of workers in the City of Austin lack paid sick time."

Do you see that statement?

A. Yes.

Q. Okay. Do you know whether that's correct or do you remember saying, I want to see that study, or do you have any memory of that statement at all?

A. Yes. And I did review the study, and then subsequently we received -- the City Council received a

that happens to would benefit from having leave that permitted them to stay home and take care of themselves while they're sick, rather than coming into work?

A. I believe a lot of workers in Austin are already offered benefits that might include paid sick leave.

Q. Okay. But what if they don't get paid sick leave?

A. They might have paid time off policies.

Q. What if they don't get pick or any type of paid time off, would they benefit from being able to stay home and take care of themselves while they were sick, instead of coming into work and maybe getting other people sick?

A. Sure. They also have the opportunity to apply for a job at a different employer that would offer those benefits.

Q. I'm going to hand you another document that's been marked Defendants' Exhibit Number 2 and ask you to take a look at it.

And have you ever seen Defendants' Exhibit Number 2 before?

A. Yes.

Q. What is Defendants' Exhibit Number 2?

A. It is a briefing paper by the Institute for Women's Policy Research.

MR. MATULA: Defendants offer into evidence

Defendants' Exhibit Number 2.

MR. HENNEKE: Objection, hearsay, lack of personal knowledge, lack of authentication.

MR. MATULA: May I respond?

THE COURT: Yes, sir.

MR. MATULA: She's already authenticated it. She said what it was. I'm not offering it for the truth of the matter asserted.

THE COURT: What purpose -- for what purpose are you offering it?

MR. MATULA: I'm offering is for purposes of establishing what information was before this witness before the vote was taken on this ordinance in February of 2018.

THE COURT: I will allow it for that limited purpose. Overrule the objection.

(Defendants' Exhibit 2 admitted)

Q. (BY MR. MATULA) Okay. I want to ask you some questions. Have you had a chance to look at it?

A. Yes.

Q. Okay. Is this a document that you or your staff had an opportunity to look at before you voted against the ordinance in February?

A. Yes.

Q. Okay. And the title of this briefing paper is

"Access to Paid Sick Time in Austin, Texas." Do you see that?

A. Yes.

Q. And the first line of it says: "Approximately 37 percent of workers in Austin lack paid sick time."

MR. HENNEKE: I'm sorry, Your Honor. I'm going to object. The limited purpose Your Honor admitted this was for the purpose of saying that it was before Council Member Troxclair. She's verified that. Again, I would object to the --

THE COURT: I think it's already in evidence that there's -- there's a 37 percent number that was before the City Council. So I'm going to overrule the objection and -- but I'm also going to note that I think it's already been put in the record.

Q. (BY MR. MATULA) Let me just ask you another question. When you testified that you didn't have before you any, quote, Austin-specific facts, data or evidence under direct examination, this is a report that deals with access to paid sick time in Austin, Texas, is it -- is it not?

A. This -- as I've stated before, this is a national organization that used national and state statistics and extrapolated them in order to apply them to the City of Austin.

We also had information from local economists that directly took issue with the findings that were in this so it was really difficult -- because -- because of the lack of Austin-specific information. So there is a statistic cited in there. I just am unknowledgeable, I guess, about the validity of it.

Q. Okay. I think that's a separate question, but --

A. Okay.

Q. -- you're not denying that this report purports to be a report of access to paid sick time in Austin, Texas, correct?

A. That's the title of the report.

Q. Okay. And you're not denying that this is a document that you had long before you voted in February of 2018 against the ordinance.

A. Yes. I don't remember when I received it. We had it at some point. And I believe this organization supports policies like this across the country, and that's probably why they were asked to put together information specific for the City Council.

MR. MATULA: Object to the nonresponsiveness of that portion of the answer.

May I approach the witness?

THE COURT: Yes, sir.

Q. (BY MR. MATULA) I'm going to hand you a document

DOUG RIGDON,
having been first duly sworn, testified as follows:

THE COURT: Please have a seat. And would you give me the spelling of your last name, please.

THE WITNESS: R-I-G-D-O-N.

THE COURT: D-O-N. Thank you, sir.

MR. HENNEKE: Your Honor, again in the interest of time, I would still be happy do to the offer of proof.

THE COURT: Well, again, in the interest of due process, I will allow the opposing parties to comment as to whether that's acceptable.

MR. MATULA: I think I'm going to pass on that.

THE COURT: Thank you.

DIRECT EXAMINATION

BY MR. HENNEKE:

Q. Could you please state your name?

A. Douglas Rigdon.

Q. Mr. Rigdon, how are you employed?

A. I am employed at Strickland Christian School.

Q. And Strickland Christian School is a plaintiff in today's lawsuit?

A. Yes, sir.

Q. Located here in Austin, Texas?

have a strong discipline policy that really helps us to have a -- a very peaceful place where children are learning, where they're very happy, where they feel safe. I think I would say that that separates us from -- from other schools.

Another thing that does separate us is that we are less expensive than most other private schools, even Christian schools, probably 30 percent less than most others.

Q. How does Strickland generate revenue?

A. Well, we have our tuition that our parents pay, and they do pay a few fees also. That's the only way we really generate revenue, except we do have a Parent-Teacher Organization that is nonprofit, where we are for profit. So they do sometimes raise money for certain special events and certain things that they want to spend money for.

Q. Nearly the exclusive sorts of revenue for Strickland, though, is in the tuition and fees that you collect?

A. That's primarily it, yes, sir.

Q. What is the Strickland tuition rate for the 2018-19 school year?

A. Well, it varies. If it's half-day kindergarten, because we have a half-day pre-K and kindergarten, and

that's around $3800 a year. And then it goes up incrementally every few grades, so that someone going to eighth grade, if he doesn't -- if he pays all through the 12 months, he might be paying $5,000 a year.

Q. Is this tuition rate locked in for the 2018-19 school year?

A. Yes, it is.

Q. And at this point, are you able to increase the 2018-19 school year tuition rate?

A. Well, I'm not, because most of my parents have already started making payments. We've made a contractual agreement with them.

Q. What are the ways that you're able to keep your tuition rate, as you testified, 30 percent or more less than your competitors?

A. Well, we rent. We don't have a building facility. We don't have a high school. That's usually very expensive. And we -- we try to do the really basic things that are needed for -- for a really good education and try not to have too many frills. And we just try to cut corners whenever we can, and some of our teachers and administrators wear many hats, so they take care of a lot of different functions.

Q. Is the affordable cost of Strickland one way that it competes for students compared to other similar private

schools?

MR. MATULA: Objection, leading.

THE COURT: Sustained.

Q. (BY MR. HENNEKE) How does your tuition rate, Mr. Rigdon, factor into your competitiveness with other private schools in Austin?

A. Well, many parents come to us who are very happy with their rates, and they have said that they are there because --

MR. MATULA: Objection, hearsay.

THE COURT: Well, overruled. And will not consider it for the truth of the matter stated but this witness's state of mind.

Q. (BY MR. HENNEKE) Please continue, Mr. Rigdon.

A. Well, many parents have come and have said that they really appreciate our rates and they couldn't afford to go to other Christian schools in town, so they're very happy with us.

Q. What is Strickland's enrollment for the 2018-19 school year?

A. Right now we're right at about 140 students.

Q. How many employees does Strickland have?

A. Last year we had 22. I expect we'll have 21 or 22 this coming school year.

Q. What type of employees are there, first of all,

in terms of full time versus part-time?

A. I have about ten full-time employees and about 11 or 12 part-time employees.

Q. And in terms of the type of employee, teachers or otherwise, what is the breakup of that 22 staff?

A. I have three employees, including myself, who -- who I would consider administrative. And I have two employees who would be temporary assistants or paper graders, and then the rest are teachers.

Q. Do your part-time employees work at least 80 hours in a calendar year?

A. Yes, sir.

Q. What -- what are the roles that your part-time employees perform?

A. Well, I have a computer teacher who is part time. I have a physical education teacher who is part time. I have some extended care workers who work in our after-school program. I also have had from time to time math or science teachers who are part time.

Q. Does Strickland have a paid leave policy?

A. Yes.

Q. What is Strickland's paid leave policy?

A. Well, each employee is given six days of paid leave. So he's able to use that in any way he wants throughout the year. He's given it on the first day of

with the City's paid sick leave ordinance?
A. I've read it, yes, sir.
Q. Is Strickland an employer subject to the ordinance?
A. We will be when it goes into effect.
Q. In front of you I believe should be Exhibit 1. Plaintiffs' Exhibit 1, Mr. Rigdon, is the paid sick leave ordinance. This is the -- this is the ordinance that you've read.
A. I don't have that.
MR. HENNEKE: May I approach?
THE COURT: Yes, sir.
THE WITNESS: Oh, this is it. Okay. Thank you.
She found it for me. Thank you.
Q. (BY MR. HENNEKE) Wanting to direct your attention to Section 4-19-1(F) on page 2. Under this ordinance, Strickland qualifies as a medium or large employer, correct?
A. Yes.
Q. I want to ask you about Section 4-19-2(K) on page 5. Does Strickland currently provide reports to its employees in the form required by this section?
A. I believe there is a section on their pay stub that shows how many hours of sick leave they have used or

have left -- or not sick time but leave time that they have left, but I'm not positive about that.

Q. Your school's policies don't allow for sick leave to carry over; is that correct?

MR. MATULA: Objection, leading.

THE COURT: Overruled.

THE WITNESS: No, they do not carry over to the next year.

Q. (BY MR. HENNEKE) So as far as any report that you currently generate, does your -- does your reporting track carried over leave time?

A. No, it does not.

Q. Do you currently have any software or accounting processes to comply with calculating carryover leave time?

A. No.

Q. So prior to the enforcement date of October 1, would it be necessary for you to determine how to comply with the reporting requirements of the ordinance?

A. Yes, it would.

Q. And in order to make this determination, will this require that you spend staff time or resources in order to determine how to comply?

A. Yes.

Q. How will you do that?

A. Well, I will probably spend some time on it

myself. And I will -- I have an accounts manager. I will probably have to pay my accounts manager extra to do that, to set that up for us with my approval.

Q. Directing your attention, Mr. Rigdon, to Section 4-19-4 on page 6 of the ordinance. Do you currently display signage at Strickland as -- as required by this section?

A. No.

Q. Would you have to create such signage in order to comply?

A. Well, I would have to create it or find it someplace.

Q. And will doing so require that you expend staff time or resources to comply with this section?

A. Yes.

Q. Do you currently have budgeted staff time or resources necessary to prepare to comply with the City's ordinance?

A. No.

Q. When does the 2018-19 school year begin?

A. It begins August 22nd.

Q. And you agree with me that the date in Exhibit 1 for when enforcement begins is October 1st?

A. Yes.

Q. If through today's hearing the paid sick leave

ordinance is not enjoined, will -- in terms of your business, will you be able to wait until October 1 to implement the requirements of Exhibit 1, the ordinance?

A. I will have to implement it when my teachers return and inform them of the new policy for the entire school year. Because it will be very difficult and maybe impossible to make the switch a month and a half into the school year.

Q. How so?

A. Well, they would be under two -- they would be under two different leave policies. A different leave -- the policy we have in effect now for the first month and a half, and then they would have to move to another policy -- we would have to move to another policy. And it would just be very difficult as far as them understanding and even us understanding if they took time off how that would affect their -- the new leave policy. It would be extremely difficult.

So I don't -- I don't think it would be -- I don't think it would be to my advantage to switch it partway through the year. I would have to start it off and keep it that way the whole year.

Q. I wanted to direct your attention to section 4-19-2(G) on page 4 of the ordinance.

How does -- how does your current policy

compare to the requirements in Section G?

A. It's a little bit hard to compare, but as far as I understand it, we -- we would not go over the limit except that -- that I have to give this -- except that since it's for specific things mentioned by the ordinance, I would have to give them leave for those specific things, rather than them deciding to use their time for themselves. But I don't think we would go over the limit, if that's what you're asking.

Q. So, Mr. Rigdon, on subsection (M) on page 5, the ordinance where it prohibits requiring employees to find a replacement to cover hours of sick time, if Strickland can't require that employees pay for their substitute teachers, how will that impact Strickland as a business?

A. It will cost us probably thousands of dollars a year from what I have seen.

Q. Do you have this cost included in your 2018-19 budget?

A. No.

Q. Can you currently estimate how much you anticipate this will cost in the next school year?

A. Are you asking about this particular part (M)? Or just to the entire ordinance?

Q. Just particularly the cost of the substitute teachers.

A. I would say in the neighborhood of -- of $1500 to $2,000.

Q. Will the requirement in the ordinance for paid leave to carry over to the following year increase costs for Strickland?

A. It will in the coming years, yes.

Q. Are these type costs -- carryover costs currently included in your budget for the school?

A. No.

Q. Do you have an employee currently to handle the administrative reporting requirements of the ordinance?

A. I don't have an employee who has been trained to do so or who is prepared to do so.

Q. How will you then have to comply with the administrative and reporting requirements to prepare for this ordinance and the 2018-19 school year?

A. Well, I -- as I said, I think I and my accounts manager are going to have to sit down and work it out together and spend some hours on it to be sure that we're in compliance before August 22nd, when school starts.

Q. Since your prior testimony was that your tuition for next year is set, how -- if this ordinance moves forward, what are your options for providing for the costs incurred due to the requirements of this ordinance?

A. Well, I may have to borrow some money. I may

have to cut some -- some other expenses; for instance, repairs that could be important. I may have to consider in future years changes to bonus policies for teachers. All those things are options.

Q. How -- how would this ordinance impact the bonus policies for teachers?

A. Well, if it's -- if the ordinance is more costly to me than my present policy, which offers a bonus to teachers, then I would have to eliminate that bonus for that -- what I call the attendance bonus if they don't use all of their time.

Q. After this upcoming school year and school years past that in the future, how will you provide for the costs associated with the ordinance?

A. Well, most probably I would have to raise tuition. I also would consider giving my employees smaller raises to pay for it.

Q. Now, do you agree every year you have some students that don't return to Strickland?

A. Yes.

Q. And in your experience at Strickland, have families cited increase in tuition as a factor in not enrolling?

A. Yes, they have.

Q. How does the relative low cost of Strickland

undue burden on my business and my employees. And because I think it should be within my rights to run my business in the way I see fit with the cooperation of my employees if they like it that way. And also because we already have a leave ordinance that -- a paid leave ordinance that I think is better for my employees than the one that the City has presented.

MR. HENNEKE: Your Honor, I pass the witness.

MR. HACKER: No questions.

THE COURT: Cross-examination, Mr. Matula?

MR. MATULA: Thank you, Your Honor.

CROSS-EXAMINATION

Q. (BY MR. MATULA) Mr. Rigdon, I want to ask you a few questions.

First, let me just familiarize myself. Where are you located? Where is -- where is the school?

A. We're in South Austin on Manchaca Road.

Q. So it's within the Austin city limits.

A. Yes, sir.

Q. Okay. And is it -- is it a tax exempt organization?

A. We are a for-profit school. So we're not tax exempt.

Q. Okay. What about most of your competitors? You

spoke about being 30 percent less expensive than other comparable schools. Did I understand that correctly?

A. Yes, sir.

Q. Okay. Are you saying you're about 30 percent less expensive from other schools that are K through 8 that are about the same size as Strickland?

A. No, I'm just speaking of schools in general in the Austin area, Christian schools and private schools in general. Not -- not public schools.

Q. All right. So that's -- that's a pretty significant reduction from what you say the standard rate is, that 30 percent, correct?

A. Yes, sir.

Q. Okay. So sounds like you could raise the tuition 5 percent and you might still have the same students enrolled. Would you agree with me?

A. Well, it's been my experience that even when we raise our rates 3 or 4 percent a year, which we try to do, we still lose students each year whose parents say, We -- we can't afford the tuition anymore.

Q. Okay. Let me ask you a few questions about that. Did you say that Strickland School usually raises its tuition rates 3 to 4 percent per year?

A. Yes, sir.

Q. Okay. And how long has it been raising its

tuition 3 or 4 percent per year?

A. Probably for the past six years.

Q. Okay. So a parent who has their student enrolled in the Strickland School, K through 8, they kind of expect the tuition to go up from year to year, don't they?

A. Some parents do.

Q. And any increase in tuition that you're testifying might be necessitated by complying with an ordinance that all employers, private employers have to comply with.

The fact that the tuition is raised, that might not be something that is going to cause these parents to pull their children out of Strickland School. Would you agree with me?

A. The fact that tuition is raised is what causes children -- parents to pull their children out of our school.

Q. And it raise -- it goes up every year, correct?

A. Yes.

Q. And the fact that it's going to go up next year, regardless of whether or not this ordinance becomes effective in October, you're still going to have parents signing up and sending their students to school there, correct?

A. Will I still have parents signing up next year,

A. That's correct.
Q. Okay. And do you have the ordinance in front of you there?
A. Yes.
Q. Maybe it will help if we walk through some of this stuff. If you could go to page 3 of 9, there's a section up there at the top that says: "An employer shall grant an employee one hour of earned sick leave for every 30 hours worked."
Do you see that?
A. Yes.
Q. Okay. And have you sat down and actually tried to figure out under the rate that the ordinance has how much more sick leave or how less sick leave your people are going to accrue than what you provide them now?
A. Well, I don't actually provide them sick leave now. I just provide them paid leave.
Q. Okay. I think we're talking about the same thing. Have you sat down and tried to figure out how much more paid leave these individuals are going to have to be given under the City ordinance as opposed to what you have in place now?
A. I think it might be fairly comparable.
Q. Here's what I'm asking: Have you actually sat down and tried to figure that out?

A. Yes.

Q. Okay. And how much more or how much less leave are you going to have to provide these people under the rate that's set out in the ordinance?

A. I think within a -- a few hours every year, it will be -- it will be close to the -- to the same.

Q. Okay. So if I'm hearing you right, when the ordinance goes into effect in October, and if you comply with the ordinance, the result is going to be you're going to have to provide your employees with a few more hours of paid leave. Would that be right?

A. It could be a few more hours -- it could -- more. It could be a couple of hours less.

Q. Okay. It sounds to me like --

A. It just depends.

Q. I'm sorry, I didn't mean to interrupt you.

A. I just -- that's what I figured.

Q. Well, would it be true that complying with the paid leave structure in the City ordinance is really not going to affect your school that much in terms of the rate at which your employees are going to accrue the paid leave, is it?

A. It will affect us because my employees don't accrue paid leave. I provide them pay -- paid leave the first day of school.

A. Well, I was -- depending on what you mean by "complain," yes, they've complained in general that their paid leave is used up.

Q. And the complaint was: I wish I had some more paid leave that I could use so I could stay home with my sick child or I could stay home myself because I've got the flu. Something along those lines?

A. No, the complaint was more to the effect: Oh, all my paid leave is used up, so I'll have to -- I know my pay will be docked.

Q. Do you think that that is treating these teachers as professionals?

A. Is what treating them as professionals?

Q. The policy that docks their pay if they get sick and can't come into work that day.

A. I would say it is treating them as a professional, yes.

Q. Let me ask you a few questions about the costs that you testified about about complying with this. I gather that you haven't spent any money yet in anticipation of complying with the Austin paid sick leave ordinance; is that correct?

A. No -- I mean yes, that's correct.

Q. Okay. Just so I'm clear, you haven't spent any money yet.

A. That's correct.

Q. Okay. But what your testimony is, is the closer we get to that October 1st date that that kicks in, you're going to have to start incurring some expenses in order to get ready for it.

A. Yes.

Q. Now, you were asked a question about signage. Do you remember that question?

A. Yes.

Q. And I think the context of the question was one of the things in this ordinance requires employers to post information somewhere where employees can see it letting them know that these are their rights under Austin's paid sick leave ordinance. Is that what you understand?

A. Yes.

Q. Okay. Now, do you have a break room or a -- or a teachers room or some kind of space set aside down at your facility where the staff can meet to eat their lunch or clock in or out?

A. Yes.

Q. Okay. And is there anything posted in that space as required by federal and state law telling these employees exactly what their rights are under those laws?

A. Yes.

Q. And we could call that signage. Would you agree

that's signage?

A. Yes.

Q. Okay. So it seems like you could post a sign right next to the sign that's already there that says, Attention Employees: Austin now has a paid sick leave policy, and here are the details about it. Couldn't you do that?

A. Well, yes, I would do that if required to.

Q. And that probably wouldn't cost you a whole lot of money to make a copy of the ordinance or some announcement and just post it on the wall, would it?

A. I don't know what a whole lot of money is, so I -- I have no idea what the cost will be or how I will get it at this point.

Q. It's not an issue that you've tried to figure out how much that's going to cost you yet, right?

A. No.

Q. And you already have some administrative people on staff who take care of some of the paperwork that goes along with running that school, correct?

A. Yes.

Q. And if the school begins to comply with this ordinance in October, will you have those people keep track of the accrual rates and usage of your employees of their sick leave?

A. Yes, I will.
Q. Do you think they're capable of doing that?
A. Yes, I think so.
Q. Okay. And you're not going to have to hire a new employee whose exclusive job is keeping track of all that information on the new sick leave ordinance; is that correct?
A. I wouldn't do that, I don't think.
Q. Okay. So that's a cost that your school can bear because there's already somebody on the payroll that does that.
A. I don't know what the cost will be. So I don't know that -- whether I can bear it or not.
Q. Okay. But the cost won't be anything to hire a new staff to oversee all of this because existing administrative staff will be able to keep the records on that. Am I clear on that?
A. They will be able to.
Q. You were asked a couple of questions. We may have to look at the ordinance here on this one, if you could get that in front of you. I think you were asked a question on direct examination about unionized employers. Do you remember that?
A. Yes.
Q. Okay. And I gather that you do not think it's

to get an understanding of your testimony up there that you don't think the paid sick leave ordinance applies to unionized employers.

A. That -- that's what I understood from reading this, but I could be wrong about that.

Q. And can you think of any of your competitors in the private K through 8 schools in the Austin area, can you think of any of them who have a unionized workforce, that is their employees belong to a union that engages in some kind of collective bargaining with the employer?

A. Are you speaking of private schools?

Q. Yes, sir. Your competitors.

A. I'm not aware of any that do that.

Q. So it would be surprising if one of your private school competitors actually became a unionized employer that engaged in collective bargaining with their employees, wouldn't it? That -- that would be odd.

A. I would think so.

Q. Okay.

MR. MATULA: Pass the witness.

CROSS-EXAMINATION

Q. (BY MR. COX) Mr. Rigley, right?

A. Rigdon.

Q. Rigdon, okay.

A. But that's close enough.

Q. Thanks for coming down here. I just have a few really quick questions.

You mentioned you had kind of put pen to paper and tried to figure out what the actual increase in costs were going to be for you for next year. What was that number, do you remember?

A. I thought it might cost me $1,500 to $2,000 a year. I think -- I think that was the question. I don't know if that include -- that is in terms of paid leave but not in terms of what it would cost to administer it.

Q. Okay. And what kind of administration costs do you think you'll incur?

A. I have no idea because I haven't tried to implement it yet.

Q. Okay. And how many students did you say are at your school?

A. Right now we have 140, but we're still enrolling.

Q. 140. So -- I mean I'm just -- just quickly putting some math to that. That's about 10 or $12 a student you expect that -- that the ordinance would cost you next year; is that right?

A. That's what I'm thinking the -- the portion that I would have to pay out for paid leave, not -- not for any kind of administration.

Q. Okay. And you mentioned that you have increased

tuition at your school over the last six years every year by several percent. Do you remember what the exact amount of tuition increased last year was?

A. Last year was three and a half to 4 percent. I don't remember the exact amount.

Q. Which is how much -- say for -- say for an eighth grader, how much money is that in a year?

A. It seems like it was about $150 a year.

Q. $150. And how many students that were enrolled in your school last year did not re-enroll this year?

A. I could only estimate. I'm sorry, I don't have that exact number, but I would say probably 30.

Q. 30. And how many of those -- are you aware of any of those that did not re-enroll because of other reasons besides a tuition increase, for example, they moved? Are you aware of any of that?

A. Yes.

Q. And what would be -- either how many or what would you estimate is -- is the number of people that didn't re-enroll because of another reason besides a tuition increase?

A. Probably 25 of the 30 did not re-enroll for some other reason.

Q. So last year about five -- you estimate that five students did not re-enroll because of the tuition increase

TAB B

REPORTER'S RECORD

VOLUME 3 OF 4 VOLUMES

TRIAL COURT CAUSE NO. D-1-GN-18-001968

APPELLATE CAUSE NO. 03-18-00445-CV

TEXAS ASSOCIATION OF BUSINESS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, AMERICAN STAFFING ASSOCIATION, LEADINGEDGE PERSONNEL, LTD., STAFF FORCE, INC., HT STAFFING LTD, D/B/A THE HT GROUP and THE BURNETT COMPANIES CONSOLIDATED, INC., D/B/A BURNETT SPECIALISTS; SOCIETY FOR HUMAN RESOURCE MANAGEMENT; TEXAS STATE COUNCIL OF THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT, AUSTIN HUMAN RESOURCE MANAGEMENT ASSOCIATION, STRICKLAND SCHOOL, LLC; AND THE STATE OF TEXAS, Plaintiffs, V. CITY OF AUSTIN, TEXAS; STEVE ADLER, MAYOR OF THE CITY OF AUSTIN, AND SPENCER CRONK, CITY MANAGER OF THE CITY OF AUSTIN, Defendants.	§	IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS 459TH JUDICIAL DISTRICT

PETITIONS IN INTERVENTION

On June 26, 2018, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable Tim Sulak, Judge presiding, held in Austin, Travis County, Texas;

Proceedings reported by machine shorthand.

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PETITIONS IN INTERVENTION

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ordinance would affect the staffing industry; in particular, your -- your business, LeadingEdge?

A. Well, it's going -- it's going to affect us in a few ways, I guess. It's the initial cost of learning this and -- and hiring somebody to manage it. We really do have to hire somebody to manage it because we're very lean, and we have a high -- high turnover rate, so we have -- every day our numbers are a moving target. Same with what we had to do with the Affordable Care Act, we had to hire somebody just to manage that, and she works full time on that.

Q. Now, do you have an estimate as to -- well, why do you think that you would have to do something similar and hire an additional person like you had to do with compliance with the Affordable Care Act?

A. Because I don't have the manpower to manage it.

Q. So you couldn't -- couldn't you just give these compliance tasks to someone who already is employed at LeadingEdge?

A. It would be nice, but I just don't have the -- I mean my -- my ACA person works full time all day long on ACA because it -- it moves every day. It changes every day. The people who are qualified, not -- making sure notices go out. There's a whole lot to it. And -- and I don't -- my other person is a payroll person.

about anything?

A. Well, I've got to -- we're supposed to put this in our handbooks, and we just revised our handbooks to keep them updated and -- for the -- for another year, and just had them all printed for another year, and I think we got those week before last.

Q. Do you -- do you know about how much that -- that cost you?

A. I think those were somewhere around $1,000 or 15 -- I'm not really sure. Somewhere around there. And then we'd have to redo our video orientation.

Q. With the handbooks, did you have to have attorneys review that?

A. Yes.

Q. Did -- so you will -- you'll have to have those redone?

A. Yes.

Q. And you mentioned the -- the video. Can you --

A. We have a video orientation that we'll have to redo. And, you know, I've not redone it before, so I'm figuring -- I don't know if we have to do a full redo. If we do, it's probably about $3,000. Partially would be about $2,000, $2,500, I'm guessing.

Q. So that video is an orientation for employees to tell them about -- -

for their normal employment duties?

MR. MATULA: Objection, leading.

THE COURT: Sustained.

Q. (BY MR. WALTERS) What would -- what burdens would this -- this training that you would have -- that your company would have to undertake have on your business operations?

A. I'm not totally sure yet, because I don't know -- I don't know the extent to the programming and how creative they'll have to be at this point. We have not gotten that far. There will be training of some type. Whether it's in person or online, I'm not sure, but there will have to be time spent training.

Q. What about legal compliance? Will you have to undertake any -- any training or education relating to that regarding the ordinance?

A. I have to -- we have to give this to your attorneys and tell us what we do have to do. I understand there's signs you have to put up and things like that. But we have to know -- understand the reporting, you know, the timelines on reporting, what type of reporting, and I don't understand that in this yet.

Q. So you had earlier mentioned that you had some employees who work within the city of Austin and you

of the -- does this provision of the ordinance raise any complications for compliance with -- regarding employees who both work within the city of Austin and earn paid sick leave and then work outside of the jurisdiction of the City of Austin?

A. It's just going to be -- for us, it's a matter of being able to manage it and how we're going to get there. We're, again, just peeling back the layers and how we're going to do that. So that is -- we will have to address that.

Q. Is it fair to say that staffing temporary employees will often work for different -- different clients within a year?

A. Yes.

Q. And if -- so if you have a -- an employee who takes paid sick leave when tasked with one client that the employee earned when tasked with a different client, which -- which client would be charged for that?

A. That's a good question. We haven't determined yet how we're going to charge, but from my preliminary looking into this and talking to a few people who have dealt with this type of thing in other states, it seems like an across-the-board hike in rates is the way to go, but we're not going to be -- we don't -- in the staffing industry, we don't get a lot of latitude in raising

rates.

Q. Do you have any estimates as to what the mandates of the paid sick leave ordinance would cost you?

A. Well, just my -- and these are playing with a calculator and just my experience of -- and taking real numbers of last year out of Austin, we worked about 720 people last year and 465 worked over 80 hours.

Q. Within the city of Austin?

A. Within the city of Austin. Now, a few of those hours may have been in Round Rock. I just -- I just looked at our branch in Austin.

And if I -- our average pay rate is $15 an hour. So the way I have to look at it -- because this becomes a liability for our business. What the liability is, I don't know. So I have to look at what could it be. Well, it could be this 465 who worked 80 hours, they're eligible. How far they go past that would be a whole 'nother math formula that I don't have. But if that 465 used one day of -- of time off, that would cost us about $55,000.

Q. And is that -- is that just the direct cost that you would be paying them under the ordinance?

A. That's just the pay rate. That doesn't include taxes and all of that.

Q. Would -- would you have to change your overall mix of compensation you provide to your employees if -- if the mandates of the paid sick leave ordinance are applied?

A. We're -- we're looking at that. If we take into consideration the liability that this creates for us -- and, again, we won't know until a year is up how much it costs, but we're going to have to guess at a lot of it. But we are not going to get it from the customers. We cannot raise the rates enough. We can do a little bit but not much.

So, you know, we pay for -- we offer essential coverage to the temporary employees medical and we pay about 50 percent of that for them as a benefit. And we don't have to. I mean it's not a -- it's not mandated that we pay that. So that would probably be one thing we would probably pull back. We pay six paid holidays to temporary employees. We can pull that back.

And I guess if it gets -- if -- if this goes into a very expensive ordeal, then the only other place I have control is payroll and eliminating some positions.

Q. So you had earlier mentioned that you would have to contact a -- a soft -- your software vendor to

Q. Both based on the effect of how you'll have to change your operations and the -- any costs.

A. I mean it's -- it's kind of all over the place. It's -- as we get into it and realize the real costs, the bottom line initially before October is we have to spend money on reprinting brochures, new orientation, hiring somebody and getting them -- getting them into this where they learn this and then somehow get trained in it, and converting the accounting system to handle this formula.

And then the other half of it is after it goes into effect and finding out the results of how this is utilized, and I already -- what I -- what I feel like I need to raise prices to, we're not going to be able to do it. Just that's my experience. And --

Q. Why do you say that -- that you would not be able to raise prices enough to compensate for this?

A. Well, I've been in this for 35 years, and we've always maintained at an even margin and always been competitive with pay rates and charge rates, and it's a fine line to do that because we're in a very competitive business. I think by not being able to charge enough, I have to look at other things to fill in the gaps, and that's all kind of guesswork right now.

Q. Do your clients have to use temporary staffing

Q. How -- how does that experience -- how do you compare that with what you know of the mandates that will be imposed by the paid sick leave ordinance and its effect on your business and compliance?

A. We were able -- we had to hire somebody for -- like we'll have to do for this, and it's mainly the tracking and the compliance side of things.

But we were -- because it was a national law, the Affordable Care Act, we -- we got a little bit of a pass on a 25-cent increase in our charge rates, and I think that probably speaks close to the average of what everybody did. I know it doesn't sound like much, but to us it's -- it's margin. It's everything.

And so this we have to -- we're approaching it very similarly, except I believe this one because we're paying per -- per hour per day for time off -- and I'm guessing it's going to get used -- without the cost of our person, just that if it got used that one day, it would be $55,000. And so we're -- we're -- our fear is this could cost a whole lot more.

Q. And why -- why are you asking the Court to -- to grant a temporary injunction stopping the ordinance before it's enforced October 1st?

A. Well, I mean for many reasons, but to -- to give it time, to give us time to evaluate it and try to

A. I do.
Q. I read something on the Internet last night that said small businesses consider their employees their most valuable resource. Would you agree with that or not?
A. Sure.
Q. These temporary workers, you said you had last year 720 of them; is that right?
A. That's close.
Q. What kind of jobs do you send them out to do in the community as a temporary worker?
A. Ours again is mainly office, clerical and administrative. So it's receptionists, admins, accounting type -- it could be accounting, customer service, those type people.
Q. They're people that work in offices where other people are working; is that correct?
A. Usually, yes.
Q. They're working in more or less close confines if it's anything like the offices I've been in, that is there's a lot of people around.
A. Can be.
Q. What do these temporary workers do when they get sick and can't come to the work?
A. What our -- our business model has always been

A. I'm a small, lean company. I hire people based on a -- an absolute need so the people who are there have specific jobs that keep them busy all day. So I don't have extra staff to handle it.

Q. Have you considered having existing staff do this function of keeping track of the accrual rate that these individuals have for earning their sick leave?

A. It would be nice, but I don't have the -- the luxury of somebody having even half day to do something like that.

Q. Does anybody who works for your company get any paid sick leave?

A. We do not -- we have paid time off in our staff.

Q. Okay. So the people you told us about who were the staff employees who work in the office, they accrue paid time off that they can use when they get sick.

A. They can use it however they want.

Q. Why do the persons -- people who work in your office as staff people, why is it that you've set it up so that those employees earn some paid time off that they can utilize for illnesses, but people -- the bulk of the employees of the temporary workforce, they don't have that benefit?

A. Our temporary workforce -- the people in the

staff, we have to do everything we can to retain them so they can take care of the temporary employees and the client companies. I have a very good tenure with my staff. Some from the day we opened the company 23 years ago.

The temporary employees come to us to find a job. That's it. They don't come to us for benefits. They come to us to find a job. Again, we're a bridge to employment, so they -- the question of benefits, I don't remember the last time that came up. It is, How much work do you all have? Can you get me an on a job?

Q. I understand. But it sounds like one of the reasons that you offer the staff employees this paid time off is because they consider it to be an important benefit to working for your company, would you agree?

A. Sure. Yes.

Q. And you would also agree that these temporary workers who don't get the paid time off, they get sick just like everybody else, correct?

A. I'm sure they do.

Q. Don't you think that it would be an important benefit for those workers to have some ability to take a day off if they're sick and not face the prospect of not getting any compensation or pay or being fired?

A. I don't know anything about them being fired

for it. That's not how our operation works. They're usually with us for months -- weeks to months, and -- and they are focused on the idea of getting benefits in the company they're going to. Our charge rates and our business model does not accommodate them earning time off other than paid holidays. We do put that in.

Q. Well, let me ask you this question, and if you don't know, you can say so, but don't you think for those 720 individuals who are employed as temporary workers that they would find some value in having paid sick leave?

A. I -- I don't know. I'm sure if you gave them free days off, they would find value in that, but we don't have a way of paying for it at this point.

Q. Well, if you weren't the owner of the company but instead you were one of the individuals who was employed as a temp, wouldn't you appreciate having paid time off?

A. I worked as a temporary, and I never thought of a temporary staffing company as a place where I would get sick time off.

Q. I understand. But would you appreciate having that benefit?

A. I have never even thought about it. So I -- it just, again, doesn't fit into the model of temporary

staffing.

Q. Let me talk about another number that you testified about, and that was your testimony if -- the 465 employees who you had last year who worked in Austin for an amount over 80 hours, if they used one day of sick leave, you said it would cost you about $55,000 to administer that benefit; is that right?

A. For their pay, yes.

Q. Yeah. Well, I'm wondering how you came up with that number because -- well, let me just break it down. The ordinance requires that employees earn paid sick leave at a rate of one hour for every 30.

A. Uh-huh.

Q. Do you understand that?

A. Yes.

Q. And you said you had 465 people who worked in Austin more than 80 hours last year; is that correct?

A. Yes.

Q. And 80 hours is the cutoff; that is, the ordinance does not require the accrual of paid sick leave for individuals who work in Austin for less than 80 hours. That's why you said that one, right?

A. Right.

Q. Okay. So of those 465 who worked more than 80 hours, how many of them worked at least 240 hours?

A. I don't know.
Q. Could you even guess?
A. I couldn't even guess. It's all over the place, so I don't know.
Q. Because when I do the math, it seems like an individual would have to work at least 240 hours in order to accrue eight hours of paid sick leave at that one hour per 30 hours rate. Do you understand what I'm saying?
A. Uh-huh. Yes.
Q. Okay. So as you sit here, you haven't looked at -- and your company keeps books and records that chart how many hours these individuals work in a year, right?
A. Uh-huh. Yes.
Q. But you haven't done any sort of analysis to look and see how many of those individuals would have accumulated eight hours of paid sick leave, at least under last year's numbers, have you?
A. We have not done that yet, and that's kind of -- that's in our plans to try to work that out and use last year's numbers to get as accurate as we can.
Q. Okay. Well, was there some reason you decided not to analyze those numbers before you came to testify here today?

A. Just didn't do it.
Q. Well, if an individual only worked 80 hours, the way I do the math, that's I think 2.6 hours of sick leave that they would be entitled to under the ordinance. Do you agree and understand that?
A. Sure.
Q. Okay. But as you sit here today, you can't testify as to how many of those 465 worked more than 80 hours last year.
A. I -- I can't today. It's why we would have to hire somebody to manage it because it's such a moving target.
Q. Okay. So when I add together the $60,000 that you say it will cost to hire this new person and the approximately $55,000 in a year that you just testified about, that's about $115,000, right?
A. That would be. That's if they used one day.
Q. $115,000 if these people use one day and if you had to hire this new person for $60,000. Is $115,000 a significant amount for your company?
A. Yes.
Q. What was your company's net profit last year?
A. Net profit was around $600,000.
Q. Your competitors in the Austin area, are there any staffing companies you're aware of in the Austin

area who have a unionized workforce?

A. I don't know of any.

Q. Okay. And I believe you testified your employees aren't unionized.

A. Correct.

Q. And have you ever heard of a staffing company in the Austin area whose workforce is unionized or has entered any kind of collective bargaining agreement --

A. No, I --

Q. -- of its employees?

A. I don't know of any.

Q. Okay. So it sounds like it would be a very unusual thing if next year there was a competitor to your company that had staffing assignments in the Austin area that had a unionized workforce.

A. I would think so.

Q. You spoke about some costs that would be involved in printing a new handbook. Do you recall that?

A. Yes.

Q. How frequently does your company update its employee handbook?

A. We do it once a year.

Q. Every year?

A. Every year.

maybe look odd. I'll leave it to the professionals for that.

Q. Well, you should have seen me two years ago, but --

A. I didn't always look like this.

Q. It sounds like the orientation that you're talking about is -- the orientation video is something that your company chooses to do --

A. Yes.

Q. -- to efficiently tell these temporary workers sort of what the rules are, right?

A. Yeah, it tells -- it keeps us very consistent in what -- what benefits we do have for them, what we expect from them and what they can expect from us. That's the purpose of the orientation.

Q. There's nothing in the ordinance, Mr. Hudson, that requires your company to produce and utilize any sort of video orientation that talks about the Austin sick leave ordinance, is there?

A. I don't know. But we are going to put it in the orientation because we like to -- our MO is to inform the temporaries the best we can on whatever issues pertain to them.

Q. Okay. But my point is that's a decision your company makes just because that's a smart way to run

go from this office, and then in the middle of the day they have to drive over to another office, or is that the type of jobs they have?

A. No. I mean not -- not in one day. They can change from one day to another.

Q. Right.

A. But not normally in the same day.

Q. Okay. When they report to work in the morning at some office on Rundberg, they stay there and work that shift all day without getting out and about and --

A. Normally, yes.

Q. Okay. So it sounds like in order to keep track of where physically these temporary workers are working, all you've got to do is look at the address of the office and then look at a map and figure out whether it's within the city of Austin, right?

A. Well, we know if they're going to Georgetown or Round Rock or wherever they're going.

Q. Okay. So tracking the geographic location where these people are working to make sure they're working in Austin, that doesn't sound like it's going to be a really difficult task for this new person that's going to be hired, right?

A. It doesn't sound -- it doesn't sound like a -- it's just a part of it. It doesn't sound like the -- a

terrible task.

Q. I'm sorry, you said --

A. It's just -- it's a part of what they would be doing. Just -- I mean it's just pieces of their job.

Q. Okay. Well, I guess what I'm trying to figure out is keeping track of where these people are doing the labor is not going to be something that is particularly burdensome for your company.

A. I -- at this point, I don't know. I honestly don't know.

Q. You also were asked some questions about how you believe the operation of this ordinance was going to affect your company's ability to obtain and use credit; is that right?

A. I don't know. I'm -- I'm guessing at that.

Q. Okay. "Guessing" meaning --

A. Meaning just --

Q. -- you're speculating?

A. Well, if it becomes a liability, the bank looks at my liabilities every year and my credit. And so I'm assuming that's part of their formula for figuring what interest rate and what amount they'll give me on credit.

Q. Okay. But you would agree with me that every time one of these temporary workers does some work for you and you have to pay them, that obligation to pay

them is also a liability to your company that has to go on the balance sheet, isn't it?

A. Sure.

Q. And any time you run up a bill to a vendor, that's a liability that your company has to report on its balance sheet, correct?

A. Sure.

Q. And I think you told me -- was the word you were using "guessing" or did I mishear that?

A. Well, we're just -- at this point we're starting to again peel back the layers on this and figure out how it will affect us. And the bank, I will have to talk to the bank and see how they will look at it. But just my history with working with the bank, it's just -- it's a liability, so they look at liabilities.

Q. Well, the truth is --

A. I hope they don't, but ...

Q. Okay. Well, the truth is, as you sit here today, you don't know how this ordinance is actually going to affect your company from an economic standpoint, do you?

A. I know going into it about what it will do. It's the after October 1st that's the mystery, and who's going to use what when. That we don't -- we have no way

I first wanted to just ask you about this idea that you -- it's necessary for you to employ a separate person at $60,000 a year. I'm just curious, are you aware of other options besides hiring on employee full time; for example, potentially hiring a service company that provides this type of service? Do you do that for any other services that your company uses, such as payroll or anything like that?

A. No, we do it -- we're all in-house with our payroll.

Q. Okay? And is there -- is there a reason that you're all in-house?

A. I'm just kind of a -- I like the control of it and we're responsible for it, and so I like -- I don't like to pay an outside service to do it and it's -- it's an efficient way to handle things.

Q. Okay. And so that's a -- that's a business decision. There's nothing that -- about your business that requires you to do that.

A. No.

Q. Okay. And so in order to comply with the ordinance if it went into effect, it would be perfectly fine for you to hire on outside group that took care of just this very particular piece of reporting to -- on a monthly basis and, you know, calculating time. You

employee to perform at a much cheaper rate?

A. No.

Q. Okay. Next I want to go through some of the other issues that you discussed that the City has kind of gone over.

But regarding handbooks, you mentioned that you just printed those out in the last two weeks; is that right?

A. We did.

Q. And you updated them. And how long have you -- have you been aware this ordinance has been in place since February of this year?

A. Yes.

Q. And why did you decide not to include that in the handbook that you just printed?

A. Just haven't taken it into consideration yet. And we were -- you know, it's a process of having the attorneys review the handbook, make sure it's all still legitimate and good, and we'll just have to do it again with this. I didn't think about putting it in the handbook, honestly, but now we -- now we need to do that.

Q. Is there a regular schedule for when your handbook is updated?

A. When they run out, and that's usually about a

Q. Okay. So next I want to talk about the software that your company currently uses.

A. Okay.

Q. You mentioned that you regularly update it, I suppose; is that correct?

A. I don't have anything to do with the updates. My partner handles all of that, and we are -- we're sent notifications it's time to update, and whenever that is, it's just random.

Q. Okay. And that -- is that software used to track an individual employee's actual hours worked? Is that what that software is for?

A. It -- it does.

Q. Okay. And it does that on an hourly basis?

A. I'm guessing so. You're talking to a guy that doesn't know how to work the software.

Q. All right. So you don't know whether -- or is it the case you don't know whether or not it tracks employee time on an hourly basis?

A. It does. We have to track that.

Q. Okay. And so if -- if the ordinance required you to track time for the purposes of paid sick leave on an hourly basis, how is that different from the current function that your software already performs?

A. Because today we don't keep up with somebody

hitting 80 hours as a benchmark and we don't track every 30 hours they work.

Q. Okay. I know that you're not a software expert or anything like that, but I'm -- do you think that it would be possible to update your software so that that process is automated? For example, every time you enter the regular time that you already do, the computer would automatically determine when they hit 80 hours and add a tick mark for every 30 hours that they work. Do you believe that that is possible?

A. I hope so.

Q. And if that is -- if you're able to achieve that in a software update, do you still think it would be necessary to employ someone at $60,000 a year to essentially look at that computer screen and --

A. In order to stay out of hot water with this, yes.

Q. Okay. So regarding the -- your employees that would eventually become eligible for -- for paid sick leave under the ordinance, the City talked about this a little bit, but your original testimony was that you believe 465 people in the last year had reached the 80-hour benchmark.

A. Right. And that was -- that was just the number I asked to be pulled up.

Q. Okay. Did you also ask how many of those employees had -- or how long any of those employees had been with the company; for example, if they left in a certain period of time after being hired?

A. I haven't yet. But we're going to figure out how to do that. I don't know if we have to do that, you know, with a ruler and manually look at it or if the computer will do it. I just haven't done it yet. But that is a project we're going to have to do.

Q. Okay. The next thing I wanted to ask you about was essentially, you know, you mentioned in your direct testimony that you're in a very competitive business.

A. Yes.

Q. I mean I think a lot of -- you know, I think we can recognize that that's probably true.

Did you -- do you have a feeling about this ordinance affecting you in some particular way that it doesn't affect your competitors?

A. I don't know.

Q. You don't know at all. And so could you assume that -- well, I don't want you to assume anything.

Are you aware of any competitors that currently do provide paid sick leave to temporary workers?

A. I don't know of any.

get a paycheck.

Q. Does NFIB have members in Texas?

A. We do. We've got about 20,000.

Q. And does NFIB have members in Austin?

A. Yes. In Austin proper, we've probably got about 1300 or so.

Q. Are NFIB members in Austin subject to the City's paid sick leave ordinance?

A. Yes, they are.

Q. And that's the ordinance that you have in front of you as Exhibit 1?

A. This looks like the resolution.

Q. Plaintiffs' Exhibit 1. I'm sorry.

A. Yes. Yes.

Q. Does -- do the NFIB -- does NFIB in Austin have members or employers both larger and smaller than 15 employees?

A. Yes.

Q. And do the NFIB Austin members -- does NFIB in Austin have members who are not unionized or under a collective bargaining agreement?

A. Yes.

Q. And it's correct that NFIB's participation in this lawsuit is an association on behalf of its members operating in the city of Austin or otherwise subject to

the City's ordinance?

A. Correct.

Q. Does your role in today's lawsuit serve to represent and advocate for your members in terms of the Austin ordinance?

A. Yes, it does.

Q. And is -- does part of that purpose include protecting the confidentiality of the identity of your specific Austin members?

A. Yes. Our members join NFIB so that we can be the, you know, voice for our collective membership.

Q. And does part of that purpose include maintaining the confidentiality of your members in order to further their Constitutional Rights of free speech and association?

A. Yes. They've often been victims of retaliation or protest if they come out against something or even in favor of something. There's been a lot of tactics to attack their business and themselves personally. So through NFIB, we can protect their identities.

Q. Does NFIB also appear today as a plaintiff on behalf of its Austin members out of concern for retaliation against its members based on their viewpoint regarding the Austin ordinance?

MR. MATULA: Objection, leading.

But I think what it means is panic mode. Three months, it may seem like a long time. And yes, this was implemented in February, but the rules just came out.

Q. How has the City assisted your members in clearing up these uncertainties?

A. They've gotten no assistance from the City at all. As a matter of fact, when they've called the City, the City was instructed not to speak about the paid sick leave, give out any advice about it.

And we even had a labor attorney that was just voluntarily helping our members has not been able to get a hold of anybody at the City, and it's her job to -- to break down these rules and protect our clients.

Q. So how do these -- how do these uncertainties and vagueness relate to any concerns that you might have specific to the subpoena power that's in the ordinance?

A. I think that's one of the most frightening aspects of this ordinance. Our members are already scared of the unknown and kind of always looking behind their shoulder because they -- at any point -- I mean this isn't the only ordinance that they have to comply with. They deal with over 7,000 federal regulations on top of state regulations and other local regulations. They spend the majority of their time just dealing with

ordinance -- the first page of the ordinance says that if you don't offer paid sick leave, it -- it causes a really high unemployment rate. The status quo right now, we have the lowest unemployment rate we've ever had. So I think that speaks for itself.

MR. HENNEKE: I pass the witness, Your Honor.

THE COURT: State?

MR. HACKER: None from the State.

THE COURT: City?

MR. MATULA: Yes.

CROSS-EXAMINATION

BY MR. MATULA:

Q. Good morning, Ms. Spilman.

A. Good morning.

Q. The National Federation of Independent Business, is that the name of the organization that you work at?

A. Correct, NFIB.

Q. Are you a lobbyist?

A. Correct.

Q. What do lobbyists do for a living?

A. They advocate.

Q. What?

A. Well, they either advocate for or against

Q. That does not sound like a very diverse realm of opinion on that question. Would you agree with me?

A. I would agree that those maybe in favor didn't respond.

Q. I read I think on your organization's website last night something that said: "For small employers, employees are their most valuable resource."

A. That's right.

Q. What does that mean?

A. They're, you know, what runs the business. They've been there -- they've been there with them. They start from the bottom. They raise them up to managerial status. They're a resource.

Q. They're not just a resource. They're the most valuable resource that a small business has is what your website says.

A. They're akin to family members.

Q. And family members get sick sometimes.

A. They do.

Q. And family members can't come to work sometimes.

A. That's right.

Q. But your organization is opposed to any mandate, as you've described it, that requires employers to provide any sort of paid sick leave to their

employees.

A. You are absolutely correct.

Q. You're an employee of this organization you lobby for, correct?

A. Correct.

Q. Do you earn paid sick leave?

A. I might. I don't ever take vacation, so I wouldn't know.

Q. You don't even know if you have paid sick leave.

A. I probably do. To be really honest, I -- I actually don't look into that, and that's probably my fault, but -- I'm sure -- we probably have benefits programs that are, you know, national office implemented in order to, you know, attract skilled workers.

Q. Well, you would agree with me that part of keeping skilled workers and attracting skilled workers is making sure that you provide those workers with benefits that are important to them?

A. Yes.

Q. It's important to you as an employee of the NFIB, correct?

A. Correct.

Q. Can you understand how paid sick leave might be an important benefit for a worker?

A. I think it is a good benefit, and I think a lot of our people need to have the opportunity to provide that and implement it themselves.

Q. Can you understand how a worker who has access to paid sick leave might be less likely to quit a job if they actually had that benefit?

A. Yes. And actually it's what makes a lot of small businesses competitive by offering a really good benefits program when they're able to do that.

Q. Can you understand how individuals who have access to paid sick leave that allow them to take some time off to care for themselves when they're sick or for a family member like a child who is sick might put a high value on that benefit?

A. I think it's a benefit with value.

Q. Value to the employees who are the most important resource of small employers, correct?

A. Yep.

Q. Who is the person at the City who you claim told you don't give out any advice?

A. Whoever answers the telephones there. And they didn't -- I didn't -- they didn't tell me that. I had several small business owners that called and also a labor attorney called.

Q. Okay. Well, let me make sure we're clear about

the testimony you gave because I think it came in kind of rushed and I want to make sure we understand.

A. Okay.

Q. No one from the City ever told Annie Spilman that they don't give -- that the City can't give out any advice to employers about the paid sick leave ordinance; is that correct?

A. Correct. I never called the City.

Q. You never asked the City?

A. No. I don't lobby the City.

Q. What you testified about was something that you heard second- or thirdhand from somebody else, correct?

A. Correct.

Q. So it may be that the person who reported that to you may not have got it accurate or may not have been telling the truth. Is that a problem?

A. I don't want to speculate to that.

Q. I'm sorry?

A. I wouldn't speculate.

Q. There was a process that led up to the City Council meeting in February where the ordinance was passed. You're familiar with that?

A. Yes.

Q. Okay. And you're familiar with the resolution that was passed by the Austin City Council last

MR. HACKER: Objection. Calls for a legal conclusion.

THE COURT: I will take the objection as to the weight to be given, but I will overrule the objection as to the question and to the admissibility of the answer.

THE WITNESS: What it means --

Q. (BY MR. MATULA) Let me withdraw that question. I'll ask you another question.

A. Oh, okay.

Q. What did you mean when you told your member that Representative Workman was going to be drafting up a new law next session that would preempt cities? What does "preempt" mean in your e-mail?

A. So moving ahead -- understanding that the council was going to pass this ordinance, moving ahead, in 2019 we would want to pass legislation that would tell cities to stay in their lane and fix potholes, and we would preempt them from even passing legislation that is outside of their jurisdiction. And that -- if that were to pass in the State Legislature, you're looking forward, right? So that wouldn't even be effective until September of the -- of that following year. So it would preempt ordinances moving forward.

Q. You're a lobbyist. You know how the

planned to do this as part of our legislative agenda.

Q. So what you've already planned on doing as part of your group's legislative agenda was to get somebody in the Legislature who you lobbied to introduce a bill that restricted cities like Austin from passing paid sick leave ordinances, yes or no?

A. Yes.

MR. MATULA: Pass the witness.

CROSS-EXAMINATION

BY MS. STEVENS:

Q. Hi, Ms. Spilman.

A. Hello.

Q. My name is Beth Stevens. I have a few follow-up questions.

How long have you been with NFIB?

A. I've been with NFIB for about four and a half years.

Q. What did you do before that?

A. I was a lobbyist for the Independent Insurance Agents of Texas, who are also small business owners.

Q. You said that there are about 1,300 of your members in the Austin area that would be covered by this ordinance; is that right?

A. Correct.

Q. How many of those already have some version of

their part-time employees and full-time employees and --

MS. STEVENS: I'll object to the responsiveness after the actual answer to my question.

THE WITNESS: Okay.

MS. STEVENS: Thank you.

Q. (BY MS. STEVENS) You talked about that you have members that are already undertaking some amount of cost to plan for the implementation in October, correct?

A. Correct.

Q. Can you tell us dollar amounts for those members?

A. The last I heard from a restauranteur was 30 to $40,000.

Q. They are already spent 30 to $40,000 on what?

A. He said the cost to look into their accounting systems, their payroll systems, cost to implement, and just hiring someone, I guess, outside. He didn't say. And then he also said that if they were going to be able to do this in-house or whatever, but he stated 30 to $40,000 on costs already incurred.

Q. So that's not prospective costs. That's costs currently already spent.

A. Correct.

Q. And it's your testimony that this -- this one restaurant has spent 30 to $40,000 already to plan to

not here anymore, and he owns many restaurants in Austin.

Q. Okay. So will you identify the person then?

A. No, I'm going to say it's confidentiality. That's why he's a member of NFIB.

Q. Okay. And so you cannot give us any more detail what this person told you he has spent 30 to $40,000 on, correct?

A. Costs to implement hiring somebody to look to see if they're going to be able to do this in-house, to look at their accounting processes, changing computer programs. I mean he gave me about five anecdotal things.

Q. So they have hired someone already to look into this, yes?

A. Yes. And he said that he has already spent 30 to $40,000. So that's all I have.

Q. Stay with me on my question. They have already hired someone to look into implementing the ordinance, yes?

A. Yes.

Q. And how much is that person being paid?

A. I don't know.

Q. Okay. And then you said they've already started reprogramming their systems for the ordinance?

answered.

THE WITNESS: Yeah.

THE COURT: Overruled.

Q. (BY MS. STEVENS) Correct?

A. Correct.

Q. And you have actually no personal knowledge of any of those dollar amounts, including the total 30 to $40,000, correct?

A. I trust what my member said.

Q. It's a yes or no question. Do you have personal knowledge as to where this 30 to $40,000 number is coming from?

A. No, and that's why it wasn't part of my testimony.

Q. And turning your attention to the ordinance, you were talking with your counsel about the timing of the implementation of the ordinance. Do you recall that testimony?

A. Yes.

Q. And you talked about right now, as we sit here in June, there's about three months for your members to kind of get up to speed and prepare to implement in October, correct?

A. Uh-huh. Uh-huh.

Q. And you talked about the enforcement that's

TAB C

REPORTER'S RECORD

VOLUME 4 OF 4 VOLUMES

TRIAL COURT CAUSE NO. D-1-GN-18-001968

APPELLATE CAUSE NO. 03-18-00445-CV

TEXAS ASSOCIATION OF BUSINESS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, AMERICAN STAFFING ASSOCIATION, LEADINGEDGE PERSONNEL, LTD., STAFF FORCE, INC., HT STAFFING LTD, D/B/A THE HT GROUP and THE BURNETT COMPANIES CONSOLIDATED, INC., D/B/A BURNETT SPECIALISTS; SOCIETY FOR HUMAN RESOURCE MANAGEMENT; TEXAS STATE COUNCIL OF THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT, AUSTIN HUMAN RESOURCE MANAGEMENT ASSOCIATION, STRICKLAND SCHOOL, LLC; AND THE STATE OF TEXAS, Plaintiffs, V. CITY OF AUSTIN, TEXAS; STEVE ADLER, MAYOR OF THE CITY OF AUSTIN, AND SPENCER CRONK, CITY MANAGER OF THE CITY OF AUSTIN, Defendants.	§	IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS 459TH JUDICIAL DISTRICT,

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EXHIBITS

From: Spilman, Annie
Sent: Thursday, February 15, 2018 3:45 PM
To: [redacted]
Cc: 'Don Barber'
Subject: RE: AUSTIN PAID SICK LEAVE

[redacted]

Thanks for the email. I've CCd Representative Workman's Chief of Staff, Don Barber, so that both he and Paul see your email.

So, first of all know that regardless of how the council votes this evening, the fight from our end is not over. Our goal, if council fails to heed our warnings and take a step back, is to delay the ordinance by injunction and get this delayed via the court system. In other cities where this was passed under the table, much like it is here, our NFIB Legal Foundation sued on behalf of several small business owners, and/or filed an amicus. We WILL ask the court to injunct a "stay" on the city ordinance until we can look at from a legal standpoint. Secondly, NFIB has already been working with Rep. Workman's office (Don, CCd) to file legislation next session that would pre-empt cities from creating inconsistent labor standards throughout the state, like paid leave, min wage, predictive scheduling, restrictive hiring practices that prohibit employers from conducting a criminal background check until a contingent offer is made.....

NFIB is part of a broad base of other industry trade groups and the Austin Greater Chamber to fight this ordinance. Councilmember Casar announced is labor union backed plan on Labor Day, and it's been full speed ahead since then. The council has had several work sessions, where they have ignored our input from day 1. The only councilmember beside Troxlcair, to try to work with us is Flannigan, and now he's been attacked by the union folks.

The council will be voting on this tonight, AND will be hearing public comment from proponents and opponents. We have several Austin business owners who will be in attendance and who will testify. I behoove you to attend this evening and tell the council how you feel. It will be a long and late hearing. The union protestors have already announced they'll be there to pressure council to vote their way. If you get to city hall around 6 or 7, you'll still be in good shape to sign up to testify.

We have fought this on the statewide level here every session and WON, but unfortunately this council doesn't seem willing to listen. We stated in a press conference this morning our opposition and consequences to the local business and local economy, AND the cost to the taxpayers here to implement the new PSL ordinance---in the form of raising our property taxes once again. We'll hope the media coverage was thorough and that council takes those final thoughts into consideration before the hearing.

If this passes tonight/early morning, you will only have until May to totally overhaul your systems and implement this new reg. Once again, many in our coalition have already confirmed they are willing to put the money in to fighting this in court. NFIB legal counsel will most definitely be a lead on the court side battle.

My cell is below, so feel free to reach out to me at any time. I can include you in our coalition calls and keep you apprised of the next steps.

DEFENDANT'S EXHIBIT 5

Thank you for reaching out. The council is completely out of control.

Annie

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