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IN THE COURT OF APPEALS
FOR THE THIRD DISTRICT OF TEXAS
AUSTIN, TEXAS

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TEXAS ASSOCIATION OF BUSINESS, *et al.*

&

STATE OF TEXAS

v.

CITY OF AUSTIN, TEXAS AND SPENCER CRONK,
CITY MANAGER OF THE CITY OF AUSTIN

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# BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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## INTRODUCTION

In February 2018, Austin enacted the city's Earned Sick Time Ordinance, No. 20180215-049 (February 15, 2018) ("Earned Sick Time Ordinance" or "Ordinance"). Appellants argue that the Ordinance is preempted by the Texas Minimum Wage Act ("TMWA") and are seeking a temporary injunction to stay the Ordinance. *Amici curiae* Law Professors submit this brief to underscore the historical context and purpose of Texas's Home Rule Amendment in support of the proposition that Austin's home rule authority should be construed broadly, and to argue that Austin's Ordinance is not preempted by existing state law.

## STATEMENT OF INTEREST

*Amici Curiae* the Law Professors include the following professors who study and teach at law schools around the country in the subject of local government law and related fields:

Lisa Alexander is a Professor of Law at Texas A&M University School of Law with a joint appointment in Texas A&M University's Department of Landscape Architecture and Urban Planning. Her teaching, research, and writing focus on local government law, business law, and housing law and policy. She is Co-Director of the Texas A&M University School of Law's Program in Real Estate and Community Development Law.

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Nestor M. Davidson, a scholar of local government law, is the Albert A. Walsh Professor of Real Estate, Land Use and Property Law at Fordham Law School, where he also serves as the Faculty Director of the Urban Law Center.

Paul A. Diller is a Professor of Law at Willamette University College of Law and the director of its Certificate Program in Law and Government. He teaches and writes in the field of local government law, with an emphasis on state-local conflict.

Joseph Fishkin is Marrs McLean Professor in Law at the University of Texas at Austin School of Law, where his teaching and writing focus on employment law, constitutional law, and election law.

William Forbath holds the Lloyd M. Bentsen Chair in Law and is Associate Dean of Research at the University of Texas at Austin School of Law. He writes and teaches in the fields of constitutional law and history.

Laurie Reynolds is Professor Emerita at the University of Illinois College of Law, where she regularly taught State and Local Government Law from 1982 until 2016.

Jessica L. Roberts is an Alumnae College Professor in Law and the Director of the Health Law & Policy Institute at the University of Houston Law Center, where her writing and teaching focuses on health law and social justice.

Erin Scharff is an Associate Professor of Law at Arizona State University's Sandra Day O'Connor College of Law, where she teaches state and local tax law and writes about local government law.

Richard Schragger is the Perre Bowen Professor, and the Joseph C. Carter, Jr. Research Professor of Law, at the University of Virginia School of Law, where he has taught State and Local Government Law and Urban Law and Policy since 2002.

Rick Su is a Professor of Law at the University at Buffalo School of Law where he teaches local government law and immigration. His research focuses on preemption and the relationship between localities, the states, and the federal government.

Kellen Zale is an Associate Professor of Law at the University of Houston Law Center, where her teaching and research focus on state and local government law, land use, and property law.

Because of their professional work and expertise regarding issues of local government, the Law Professors are interested in the proper interpretation of Texas's Home Rule Amendment. They submit this brief to ensure that its broad scope and application are granted appropriate deference and dignity.

No fee has been or will be paid for the preparation of this brief.

## ARGUMENT

### I. Municipal Home Rule, Enshrined in the Texas Constitution, Heightens Government Responsiveness to Local Concerns, Facilitates Policy Innovation, and Ensures Greater Democratic Participation.

Home rule developed in the United States as a response to the previous "Dillon's Rule" regime, under which municipalities only possessed as much lawmaking authority as the state legislature explicitly granted to them. Starting in the late nineteenth century, a movement emerged to enable local autonomy by instituting home rule, which most states have done in some form. *See* Paul A. Diller, *Intrastate Preemption*, 87 Boston L. Rev. 1113, 1126-27 (2007).

Texas is one of many states that enshrine the concept of home rule in their constitutions. In 1912, Texas voters overwhelmingly approved a state constitutional amendment that granted to municipalities with over 5,000 residents authority to "adopt or amend their charters" and enact ordinances not "inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of [the] State." Tex. Const. Art. XI, § 5.[1] This amendment—and home rule generally—allows municipalities to efficiently address the particular needs and

[1] Tex. H.J.R. 10, 32nd Regular Session: Election Details, Legislative Reference Library of Texas, https://lrl.texas.gov/legis/billsearch/amendmentDetails.cfm?amendmentID=51&legSession=32-0&billTypedetail=HJR&billNumberDetail=10

preferences of their own communities by giving them permanent and substantive lawmaking authority. *See* Diller, *Intrastate Preemption*, 87 Boston L. Rev. at 1124.

The policy rationales supporting such a grant of authority are many and significant. One important benefit of home rule is that it empowers localities to enact policies that are responsive to local concerns. Local government, being closest to those governed, is often the best situated to identify the needs and interests of their constituents and implement responsive policies. In fact, one of the major objectives animating Texas's Home Rule Amendment was "to avoid interference in local government by the state legislature." Terrell Blodgett, *Texas Home Rule Charters* 2 (Tex. Mun. League, 2d ed. 2010). Moreover, allowing cities legislative authority over their own affairs frees the state legislature from the tedious task of dealing with municipal issues, allowing it to spend its time focused on statewide issues, an especially important benefit in a state like Texas whose legislature meets only every other year. *See id.* (In considering the Home Rule Amendment, "[t]he [Texas] legislature finally realized its capacity to debate and resolve issues of statewide importance was being usurped disproportionately by the attention it gave to city charters.")

Municipalities with broad home rule authority can also serve as Brandeisian laboratories of democracy. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal

system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."). Allowing localities similar latitude to experiment with solutions to persistent problems can foster even greater innovation in policymaking. Indeed, cities can foster substantial innovation in policymaking as localities work to respond to local needs in ways that, if successful, can be adopted elsewhere.

Finally, home rule allows for greater democratic participation. Local government is more accessible to local communities and provides a venue where residents can make their policy preferences heard. Beyond that, local elected officials generally represent a smaller number of constituents, allowing for a more accurate representation of their interests. *See* Blodgett, *Texas Home Rule Charters* 2 (Tex. Mun. League, 2d ed. 2010) (one major objective of Texas's Home Rule Amendment was "to create a favorable climate for more direct governing of cities by their citizens"); Paul A. Diller, *Why Do Cities Innovate in Public Health? The Implications of Scale and Structure*, 91 Wash. U. L. Rev. 1219, 1257-58 (2014).

## II. Texas's Home Rule Amendment, the Culmination of a Long-Term Trend in the State Towards Granting Cities Greater Local Authority Over Their Own Affairs, Provides a Broad Grant of Power to Municipalities.

Texas's adoption of home rule was part of a nationwide movement starting in the late 19th century to enshrine the concept of municipal home rule in state constitutions to take advantage of the policy benefits outlined above in Section I.

*See* Kenneth E. Vanlandingham, *Municipal Home Rule in the United States*, 10 Wm. & Mary L. Rev. 269, 277 (1968). But for decades before it formally adopted the constitutional Home Rule Amendment in 1912, Texas had been moving towards granting incorporated cities greater control over their own affairs.

Texas's first steps towards home rule came in the form of limiting the state legislature's authority to enact special laws—those that apply only to certain cities or individuals and were generally seen as overly meddlesome in local affairs—in favor of general ones. John P. Keith, *City and County Home Rule in Texas* 14 (Institute of Public Affairs, University of Texas 1951). To this end, the reconstruction constitution of 1869 prohibited the legislature from enacting special laws that sought to alter roads or plots in cities and villages. *Id*. Voters apparently found this fairly modest prohibition on special laws not sufficient to prevent state interference in local affairs, so in 1873 they approved more stringent restrictions on special laws, especially as they related to local issues. *Id*. at 15. Members of the constitutional convention of 1875 went even further, prohibiting the legislature from enacting any special or private law that would regulate the affairs of local governments, change their charters, or place county seats, among other things, except as specifically authorized by the constitution. *Id*.

With these prohibitions on special laws, voters were able to prevent some state interference with the laws and affairs of individual municipalities. The state,

however, could still regulate the actions of municipalities through general laws and retained the authority to adopt and, in some circumstances, amend a city's charter through special laws. *Id*. at 18. This remained the case for larger cities until 1912, though in 1876 the state constitution was once again amended to require the legislature to adopt charters for cities under 10,000 only by general law. *Id*. at 19. In 1909, the population threshold was dropped to 5,000 residents. *Id*.

While these steps decreased the extent to which the state legislature could control local affairs, most cities were still susceptible to state legislative interference. First, the charters of most urbanized cities—those with over 10,000 and later, over 5,000 residents—were still controlled by the state legislature, which could amend them with general laws. *Id*. at 21. On the flip side, the state legislature found itself bogged down by the need to involve itself in the minutiae of local governance, since it had to approve of any changes to the charters of large cities; this responsibility was especially onerous since the state legislature met only every other year. In fact, in 1911 the legislature's enrolling clerk was quoted in an article in the *Dallas News* complaining that his work had been jammed up for years because city charter bills comprised over half of the legislature's output. *Id*. at 22. Although a count of the actual legislative record in 1911 found this claim to be an exaggeration, it rang true enough that the legislature was willing to consider the virtues of home rule. *Id*. at 24.

In relevant part, the 1912 Home Rule Amendment granted cities with populations over 5,000 the power to adopt and amend their own charters, and to adopt charter provisions and ordinances not "inconsistent with the Constitution of the State or of the general laws enacted by the Legislature of th[e] State." Tex. Const. Art. XI, § 5. The amendment effectively reallocated power between the state and local governments: rather than look to the state for authority to enact local measures, cities could address the increasingly complex and localized problems they encountered for themselves and free the state legislature of the responsibility of managing local affairs. Capping off decades of efforts to increase local government autonomy, Texans adopted the Home Rule Amendment with 74% of voters approving. Tex. Const. Art. XI, § 5.[2]

The authority granted to cities under the Home Rule Amendment is substantial. Analyzing the provision, the Texas Supreme Court summarized the state's home rule doctrine as follows:

> It was the purpose of the Home-Rule Amendment ... to bestow upon accepting cities and towns of more than 5000 population full power of self-government, that is, full authority to do anything the legislature could theretofore have authorized them to do. The result is that now it is necessary to look to the acts of the legislature not for grants of power to such cities but only for limitations on their powers.

[2] Tex. H.J.R. 10, 32nd Regular Session: Election Details, Legislative Reference Library of Texas, https://lrl.texas.gov/legis/billsearch/amendmentDetails.cfm?amendmentID=51&legSession=32-0&billTypedetail=HJR&billNumberDetail=10).

*Forwood v. City of Taylor*, 214 S.W.2d 282, 286 (Tex. 1948). Put another way, "[a] home-rule city is not dependent on the Legislature for a grant of authority." *Quick v. City of Austin*, 7 S.W.3d 109, 123 (Tex. 1998).

Thus, the Home Rule Amendment grants cities plenary legislative power, an outcome the state had been moving towards since 1869. Given its constitutional placement and the benefits of home rule that Texas voters sought to achieve, this authority should not be abridged lightly.

## III. Appellants Must Demonstrate that the State Legislature, Through Clear and Unmistakable Language, Intended to Preempt Local Paid Sick Leave Laws, Which They Have Failed to Do.

Texas grants home-rule municipalities plenary legislative power, subject only to limitations imposed by the city's charter, state law, and the state constitution. *City of Galveston v. Giles*, 902 S.W.2d 167, 170 (Tex. App.—Houston [1st Dist.] 1995, no writ) (a home-rule city's "powers are plenary, subject only to the limitations of the City's own charter, ordinance, and superior statutes"). A local ordinance is only considered preempted when "the Legislature expresse[s] its preemptive intent through clear and unmistakable language." *BCCA Appeal Grp., Inc. v. City of Houston*, 496 S.W.3d 1, 8 (Tex. 2016). There is a presumption that a city ordinance is valid and the burden of showing its invalidity rests on the party attacking it. *Town of Ascarate v. Villalobos*, 223 S.W.2d 945, 950 (Tex. 1949). When a local law and a state statute deal with the same subject, the local

law will be upheld unless it is *in conflict* with the state statute, with courts given the "duty … to reconcile the two 'if any fair and reasonable construction of the apparently conflicting enactments exist[s] and if that construction will leave both enactments in effect.'" *Cooke v. City of Alice*, 333 S.W.3d 318, 323 (Tex. App.—San Antonio 2010, no pet.).

The Texas Minimum Wage Act (TMWA), which governs an employer's duty to pay their workers a base minimum wage, does not preempt Austin's Earned Sick Time Ordinance because minimum wage, conventionally defined, does not deal with other employee benefits like paid sick leave. Appellants ignore this fact when they contend that the payment workers receive while taking paid sick leave under the Ordinance should be considered part of their base wage under the TMWA. Appellants Texas Ass'n of Business *et al.* Opening Br. at 22. Appellants' argument, in addition to being without merit in light of the purposes of the TMWA as discussed below, also ignores established preemption precedent in Texas, which requires a state statute's preemptive intent to be unmistakably clear. That is, appellants have failed to demonstrate that the TMWA, which preempts local ordinances governing wages, has *clearly and unmistakably* evinced the Legislature's intent to also preempt local laws around employment benefits like Austin's Ordinance. As such, Austin's Earned Sick Time Ordinance should be upheld.

### A. The Term "Wages" in the Context of the TMWA Does Not Include Benefits Like Sick Leave.

The TMWA does not define "wages" at all, let alone in a way that includes paid sick leave. In fact, the purpose and structure of the TMWA support the conventional definition of minimum wage, which generally excludes the value of other employee benefits like paid sick leave and vacation leave. Bearing in mind that Texas's preemption standard requires clear and unmistakable intent to preempt local authority on a given issue area, it is clear that the plain language of the TMWA does not preempt Austin's Earned Sick Time Ordinance.

Appellants look to Black's Law Dictionary for support for the proposition that "wages" includes payment for time taken off while sick. Appellants Texas Ass'n of Business *et al.* Opening Br. at 23-24 (defining wages as "[e]very form of remuneration payable for a given period to an individual for personal services, including salaries, commissions, vacation pay, dismissal wages, bonuses and reasonable value of board, rent, housing, lodging, payments in kind, tips, and any other similar advantage received from the individual's employer"). Such an expansive definition of the term "wages," however, would eviscerate the TMWA, running directly counter to its purpose, which is to insure that workers have a minimum amount of dollar compensation regardless of whether other benefits such as paid sick time are provided or not provided. *See* Tex. Gov't Code § 311.021(3)

(“In enacting a statute, it is presumed that…. a just and reasonable result is intended”).

If the TMWA did incorporate Appellants’ definition of “wages”—that is, if compensation for sick time as well as vacation pay were considered part of an employee’s base wage—it would logically follow that employers could pay workers a sub-minimum wage for hours worked if they also provide paid sick or vacation time, since employers could consider the value of those benefits as part of a worker’s base wage. Indeed, with this interpretation, if an employer provided sufficient paid sick time and vacation time, that employer would not need to provide any dollar compensation at all to be in compliance with the law. Certainly the drafters of the TMWA, which was meant to ensure that workers are paid a prescribed base minimum wage, did not envision such an outcome.

Moreover, when the drafters of the TMWA wanted to allow something other than dollar compensation to count for the statute’s purposes, they were explicit about what could be so counted. The TMWA states that employers can include the “reasonable cost …. of furnishing meals, lodging, or both to the employee” in the calculation of an employee’s wage under the TMWA. Tex. Lab. Code § 62.053. The statute also allows employers to apply a tip credit to a worker’s base minimum wage if that worker regularly receives tips as a part of their job. Tex. Lab. Code § 62.052. These carefully tailored provisions indicate that if the legislature intended

the TMWA to include remuneration for paid sick leave to be included in the calculation of a worker's base pay, it would have explicitly done so, as it did for the value of tips and employer-provided meals and lodging.

Appellants cite the Texas Supreme Court's recent decision in *Laredo Merchs. Ass'n v. City of Laredo* to bolster their argument that the plain language of the TMWA is "unmistakably clear." Appellants Texas Ass'n of Business *et al.* Opening Br. at 31. But this reliance is misplaced. *Laredo* dealt with the question of whether the state's Solid Waste Disposal Act (SWDA) preempted a local plastic bag ban. *City of Laredo v. Laredo Merchs. Ass'n*, 550 S.W.3d 586, 590 (Tex. 2018). In that case, the SWDA clearly stated that local governments could not "prohibit or restrict, for solid waste management purposes, the sale or use of a container or package in a manner not authorized by state law[.]" Tex. Health & Safety Code § 361.0961. The statute did not define the terms "container" or "package." In *Laredo*, the court looked to dictionaries to determine the ordinary meaning of those words but noted that "the common understanding of the words is only the beginning of the inquiry. We must also consider the statutory context to determine whether the Legislature intended a narrower or more specialized meaning than the words used would ordinarily carry." *Laredo* at *8. In striking down the local plastic bag ban, the court ultimately rejected the city's argument that the term "container or package" in the context of the statute referred only to

trash, pointing to a provision in the SWDA that referred to a "container or package" as something that could be sold or used for a fee or deposit, which trash could not. *Id.* The court also rejected the city's argument that "container or package" referred only to solid waste receptacles, since the SWDA also mentions "packaging," which in its ordinary meaning is not a solid waste receptacle. *Id.*

Thus, in *Laredo*, even though the SWDA did not define "container or package," the context of the statute made it clear that the plain meaning of the words tracked with the legislative intent behind the statute. In this case however, as explained above, even if the general meaning of the term "wages" could include paid sick leave under certain circumstances, the context and purpose of the TMWA make it clear that the legislature did not intend to incorporate such an expansive definition of the term in the minimum wage statute.

### B. The Meaning of the Term "Wages" in the Fair Labor Standards Act, Which Is Incorporated Into the TMWA, Does Not Include Sick Leave Pay.

The fact that the TMWA incorporates the federal minimum wage standards found in the Fair Labor Standards Act (FLSA) bolsters the argument that the TMWA does not preempt Austin's Earned Sick Time Ordinance, since it has been firmly established that the FLSA does not govern benefits like paid sick leave.

Like the TMWA, the FLSA explicitly allows employers to use a tip credit and include the value of lodging and food when calculating the minimum wage

they must pay to employees. 29 U.S.C. § 203(m). In contrast, the FLSA does not allow employers to count pay accrued under a paid sick time policy towards an employer's minimum wage obligations. *See, e.g.*, *Copeland v. ABB, Inc.*, No. 04-4275 CV C NKL, 2006 WL 290596, at *3 (W.D. Mo. Feb. 7, 2006), *aff'd*, 521 F.3d 1010 (8th Cir. 2008) (agreeing with the Department of Labor that "the FLSA does not govern fringe benefits such as paid leave and that its scope is specifically limited to minimum wages and overtime compensation"); *Chavez v. City of Albuquerque*, 630 F.3d 1300, 1308 (10th Cir. 2011) (compensation for vacation and sick days actually taken by the employee should not be used to calculate an employee's overtime rate under the FLSA); *Ward v. Costco Wholesale Corp.*, No. 208CV2013FMCFFMX, 2009 WL 10670191, at *2 (C.D. Cal. May 6, 2009) ("The Court rejects Defendant's proposed calculation and concludes that v*acation and sick pay should be excluded from the calculation of whether the FLSA's minimum wage and overtime provisions have been satisfied*.") (emphasis added).

Since the FLSA's definition of "minimum wage" does not encompass pay accrued under a paid sick leave policy, if anything, the incorporation of the FLSA's minimum wage definition supports the opposite conclusion: like the FLSA, the TMWA does not include paid sick leave in the definition of a wage. Therefore, it cannot be said that the legislature's incorporation of the FLSA's minimum wage

standards provide "clear and unmistakable" proof that the Texas legislature intended to preempt local paid sick leave schemes when it enacted the TMWA.

### C. The Definition of "Wages" in Texas's Payday Law Does Not Affect the Meaning of the Term in the TMWA.

Finally, there is no evidence that the definition of "wage" in Texas's separate Payday Law, which includes wages owed under an employer's paid sick leave policy, was meant to be incorporated into the TMWA. Nor does the Payday Law itself preempt local paid sick leave ordinances. Indeed, the expansive definition of "wages" under the Payday Law indicates that if the Texas legislature intended for the TMWA to encompass remuneration for paid sick leave in its definition of the minimum wage, it knew well how to do so.

Texas's Payday Law defines wages to include those owed under an employer's paid sick leave policy. Tex. Lab. Code § 61.001(7). That definition, however, appears in a different statutory chapter than the TMWA and deals with an employer's obligation to timely pay out back-wages and other compensated benefits to employees, rather than their obligation to pay a minimum wage. That is, the definition of wages in the separate Texas Payday Law does not provide unmistakable evidence of an intent for the TMWA to preempt local paid sick leave laws.

The Texas Payday Law requires employers to pay wages owed to them in full, on time, and on regularly scheduled paydays. *See Igal v. Brightstar Info. Tech.*

*Grp., Inc.*, 250 S.W.3d 78, 81-82 (Tex. 2008). Under the law, "wages" are defined as "compensation owed by an employer for labor or services rendered by an employee … and vacation pay, holiday pay, *sick leave pay*, parental leave pay, or severance pay 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). The law also stipulates acceptable forms of payment and methods of delivery. It authorizes the Texas Workforce Commission to accept wage claims from aggrieved employees and to order payment to employees of wages determined to be due and unpaid.

There is no indication that the Texas legislature intended to incorporate the definition of "wages" in the Texas Payday Law into the TMWA. In fact, the Payday Law has an entirely different purpose than the TMWA: where the TMWA sets a base wage that employers must pay their employees, the Payday Law requires employers to timely pay any wages and enumerated benefits they owe their workers. *See Igal v. Brightstar Info. Tech. Grp., Inc.*, 250 S.W.3d at 81-82.

Nor can the Texas legislature be said to have intended for the Texas Payday Law itself to preempt the field of paid sick leave requirements. At most, the Payday Law represents an extremely narrow entry into the field of sick pay by providing an enforcement mechanism for recovering sick pay owed to employees under written agreements or policies. Under Texas law, "[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." *BCCA Appeal Grp., Inc.*, 496 S.W.3d at 7 (citations omitted). Rather, a local regulation should be upheld when there is no clear conflict between the challenged ordinance and the state statute allegedly preempting it. *Cooke v. City of Alice*, 333 S.W.3d at 323 ("[w]hen a home rule city ordinance appears to be in conflict with a state statute, our duty is to reconcile the two if any fair and reasonable construction of the apparently conflicting enactments exist[s] and if that construction will leave both enactments in effect"). Here, there is nothing in the Ordinance that actually conflicts with the Payday Law: the Earned Sick Time Ordinance establishes a requirement that employers allow workers to accrue paid sick leave and the Payday Law creates a mechanism to ensure that workers receive all of their pay on time.

Since there is no indication that the Texas legislature intended the TMWA to incorporate the definition of "wages" in the Texas Payday Law and the Payday Law itself does not preempt a local paid sick leave ordinance, the definition of "wages" in the Payday Law does not provide "clear and unmistakable" evidence that the state legislature intended to preempt local paid sick leave requirements. Rather, the definition of wages in the Payday Law once again stands for the opposite conclusion from that drawn by Appellants: that if the legislature had

intended to preempt local paid sick leave ordinances under the TMWA, it knew how to define wages in such a way that would include paid sick leave pay, as they did in the Payday Law. Since the legislature did not do so, it is clear that the TMWA was intended to apply only to base compensation, not other employee benefits like paid sick or vacation leave.

## IV. Appellants' Efforts to Restrict Austin's Home Rule Authority and Obscure Well-Established Precedent on Preemption Is Part of a Recent and Troubling Trend of Undermining Local Democracy.

Appellants' effort to strike down Austin's Earned Sick Time Ordinance is part of a growing movement towards recalibrating the balance of power between states and localities against local democracy. The preemption analysis that Appellants propose ignores the history, purpose, and text of Texas's Home Rule Amendment. Voters in Texas overwhelmingly chose to enshrine the concept of local autonomy in the state constitution, shielding it from state legislative efforts to unduly interfere with that authority. And the Texas Supreme Court has consistently protected the value of local self-government that underlies the amendment, establishing a preemption framework that upholds local legislation unless the state *clearly and unmistakably* intends to revoke local power in a particular area. Accepting Appellants' arguments when the state legislature has evinced no such clear and unmistakable intent to preempt local paid sick leave laws would break

with clearly established precedent, severely undermining constitutional home rule in Texas.

Indeed, that effort is part of a marked trend towards the erosion of home rule. In recent years, the state of Texas has become more aggressive in enacting preemptive laws that arguably infringe on the constitutional right to home rule. For example, SB4, which was partially enjoined by the Fifth Circuit Court of Appeals, sought not only to prohibit cities from enacting "sanctuary city" policies, but would also have fined cities and exposed local officials who supported or endorsed such policies to personal liability and potentially removal from office. *See City of El Cenizo v. Texas*, No. 17–50762, 2017 WL 4250186 (5th Cir., Sept. 25, 2017).

Governor Abbott has also indicated no small amount of antipathy towards the concept of home rule, commenting that "[a]s opposed to the state having to take multiple rifle-shot approaches at overriding local regulations, I think a broad-based law by the state of Texas that says across the board, the state is going to pre-empt local regulations, is a superior approach." Patrick Svitek, *Abbott Wants "Broad-Based Law" That Pre-empts Local Regulations*, The Texas Tribune, March 21, 2017.[3] In fact, the state legislature attempted something similar in 2015 when it considered a bill that would have preempted all local regulations related to the use of private property, regulation of any activity licensed by the state, and any

[3] available at https://www.texastribune.org/2017/03/21/abbott-supports-broad-based-law-pre-empting-local-regulations/.

local ordinance setting more stringent standards than a state law on the same subject. *See* Grassroots Change, *Ground Zero: Preemption in Texas*, June 18, 2015.[4] Such an approach would eviscerate the Home Rule Amendment, essentially returning Texas to the "Dillon's Rule" era when cities had to turn to the state legislature for explicit authorization to enact any local ordinance.

These efforts to undermine local authority go beyond the traditional application of preemption doctrines, harkening back to the so-called "ripper" bills of the early 19th century that "wrested municipal functions out of urban hands and transferred them to state appointees." Richard Briffault, *Voting Rights, Home Rule, and Metropolitan Governance: The Secession of Staten Island as a Case Study in the Dilemmas of Local Self-Determination*, 92 Colum. L. Rev. 775, 805 (1992).

Attempts to erode home rule are not limited to Texas. Some states have enacted laws that remove large swaths of local regulatory authority. For example, a Michigan law commonly called the "Death Star" bill preempted local authority over myriad labor and employment issues, including the minimum wage, employee benefits, work stoppages, fair scheduling, apprenticeships, and remedies for workplace disputes. No. 105, 2015 Mich. Pub. Acts 64 (codified at Mich. Comp. Laws §§ 123.1381-.1396 (2018)). And Texas is not the only state to attempt to punish local officials for acting in a sphere were local regulation has been

[4] available at https://grassrootschange.net/2015/06/ground-zero-preemption-in-texas/.

preempted: Arizona went even farther in 2014 when it enacted S.B. 1487, which allows that state's Attorney General, at the behest of a state legislator, to investigate whether any municipal ordinance is preempted by state law and, if he or she finds that it is, withhold state-shared revenue from the city in question. A.R.S. § 41-194.01.

This broader context is important to note because it shows that each individual removal of municipal authority cannot be seen as an isolated attempt to vindicate a particular state preemption statute, but part of a larger attack on the concept of home rule itself. In light of this concerted effort to undermine home rule occurring in Texas and across the country, it falls to courts to be vigilant in protecting local democracy as enshrined in the Texas Constitution.

## CONCLUSION

For the foregoing reasons, the Law Professors respectfully urge this Court to deny Appellants' request to enter a temporary injunction to stay Austin's Earned Sick Time Ordinance.

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing brief was served on all counsel of record through the Court's electronic filing system on September 13, 2018.

*/s/ Jane Webre*
Jane Webre

## CERTIFICATION OF COMPLIANCE

I certify that the foregoing brief was prepared using Microsoft Word 2010, and that, according to its word-count function, the sections of the foregoing brief covered by TRAP 9.4(i)(1) contain 5,442 words in a 14-point font size and footnotes in a 12-point font size.

*/s/ Jane Webre*
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