No. 03-18-00445-CV

IN THE THIRD COURT OF APPEALS
AUSTIN, TEXAS

TEXAS ASSOCIATION OF BUSINESS, et al.
Plaintiffs-Appellants/Cross-Appellees,

v.

CITY OF AUSTIN, TEXAS
Defendant-Appellee/Cross-Appellant,

On Appeal from the 459th District Court, Travis County, Texas
Cause No. D-1-GN-18-001968

BRIEF OF AMICI CURIAE WORKERS DEFENSE PROJECT, THE SAFE ALLIANCE, L'OCA D'ORO LLC, JOE HERNANDEZ, LUIS OLIVARES, LAURA OLVERA, AND COURTNEY SZIGETVARI IN SUPPORT OF APPELLEE/CROSS-APPELLANT, THE CITY OF AUSTIN

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STATEMENT OF INTEREST

The entities and individuals filing this brief are local Austin workers, businesses, and advocacy organizations with an interest—individually and through their members—in the enactment of the City of Austin's Earned Sick Time Ordinance (the "Ordinance"). Entities named are Workers Defense Project, a 501(c)(3) non-profit organization that advocates for the rights of workers, The SAFE Alliance, a 501(c)(3) non-profit organization that advocates for domestic violence survivors, and L'Oca d'Oro LLC, a for-profit Limited Liability Company that operates a restaurant business in the City of Austin. The remaining filers—Joe Hernandez, Luis Olivares, Laura Olvera, and Courtney Szigetvari—are each residents of the City of Austin and join this brief in their individual capacities. As indicated by citations to the record in this brief, the majority of these filers testified before Austin City Council during its consideration of the Ordinance at issue in this case.

Filers bring this brief as Amici Curiae to specifically address Plaintiffs' claims under the Texas Constitution, each of which requires Plaintiffs to plead and prove that the legitimate governmental purpose predicating the Ordinance is outweighed by the burden placed on Plaintiffs' Constitutional rights. As individuals and entities that are painfully and personally aware of the circumstances that caused the City of Austin to enact the Ordinance, filers seek to

advise the Court regarding the legitimate governmental purposes served by the Ordinance, the Ordinance's narrowly tailored effort to serve those purposes, and the legal and factual deficiencies in Plaintiffs' claims.

SUMMARY OF ARGUMENT

First, because the Ordinance has not yet gone into effect, Plaintiffs do not have standing to bring "as-applied" constitutional challenges to the Ordinance as it has not yet been "applied" to anyone. For this reason, Plaintiffs have argued that their constitutional claims are cognizable as "facial" challenges. However, Plaintiffs failed to show the district court that any portion of the Ordinance is unconstitutional on its face because they neglected to plead or prove that any portion of the Ordinance *always* operates unconstitutionally—the inherent definition of a facial challenge.

Second, even if Plaintiffs' constitutional claims were cognizable, Plaintiffs failed to plead and prove that the Ordinance is not narrowly tailored (much less, not rationally related) to a legitimate governmental purpose. Plaintiffs also failed to prove that the importance of the Ordinance is outweighed by any burden placed on Plaintiffs' constitutional rights. To the extent Plaintiffs offered any evidence on these issues at all, the district court was free to disbelieve such evidence, to weigh contrary evidence more favorably, and to engage in rational speculation about the purposes and interests served by the Ordinance. The personal stories of the filers

of this brief are instructive in this regard, were considered by Austin City Council before enactment of the Ordinance, and are made part of the record at the district court below.

Third, Plaintiffs failed to prove to the district court that they would suffer a "probable, imminent and irreparable" injury if the Ordinance was not enjoined. The district court was within its discretion to find that Plaintiffs' alleged injuries were not imminent because no enforcement of the Ordinance would be likely before the conclusion of the case on its merits.

Finally, Plaintiffs failed to give any basis in the district court for enjoining the *entire* Ordinance when specific provisions of the Ordinance Plaintiffs claim to be unconstitutional are severable from the Ordinance in accordance with the Austin City Charter, allowing those provisions to be enjoined while the remainder of Ordinance remains in effect.

STANDARD OF REVIEW

"A temporary injunction is an extraordinary remedy and does not issue as a matter of right." *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). Rather, the party seeking injunctive relief has the burden to 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." *Id*.

A district court's denial of a temporary injunction is given extreme

deference by the appellate courts, and "[t]he reviewing court must not substitute its judgment for the trial court's judgment unless the trial court's action was so arbitrary that it exceeded the bounds of reasonable discretion." *Id.*; *see also ICON Ben. Adm'rs II, L.P. v. Abbott*, 409 S.W.3d 897, 902 (Tex. App.—Austin 2013, no pet.). In conducting this abuse-of-discretion analysis, the appellate court is only to consider the trial court's order and its support in the record, not the actual merits of the underlying claims. *Synergy Ctr., Ltd. v. Lone Star Franchising, Inc.*, 63 S.W.3d 561, 564 (Tex. App.—Austin 2001, no pet.). The Court must "review the evidence before the trial court in the light most favorable to the court's ruling, draw all reasonable inferences from the evidence, and defer to the trial court's resolution of conflicting evidence." *ICON*, 409 S.W.3d at 902. "A trial court does not abuse its discretion if . . . evidence appears in the record that reasonably supports the trial court's decision." *Id.* "When, as here, the trial court does not make findings of fact or conclusions of law, [appellate courts] must uphold the [trial] court's order on any legal theory supported by the record." *EMSL Analytical, Inc. v. Younker*, 154 S.W.3d 693, 696 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (citing *Universal Health Servs., Inc. v. Thompson*, 24 S.W.3d 570, 577 (Tex. App.—Austin 2000, no pet.)).

ARGUMENT AND AUTHORITIES

I. PLAINTIFFS FAILED TO PROVE A PROBABLE RIGHT TO RELIEF AS TO THEIR CONSTITUTIONAL CLAIMS

In order to have the Ordinance enjoined on the basis of their constitutional claims, Plaintiffs were required, as a threshold issue, to prove to the district court that they were likely to succeed on the merits of one or more of these claims. *See Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). In order to do so, Plaintiffs were required to offer proof of each and every element of their constitutional claims. Failure to provide evidence of even one element of these claims is a non-arbitrary basis for the Court to determine that Plaintiffs had not shown a probable right to relief. And, even if such evidence was presented, the district court was free to disbelieve such evidence, favor conflicting evidence, and make inferences from the evidence or lack thereof. *ICON*, 409 S.W.3d at 902. Because Plaintiffs failed to provide evidence for multiple elements of their constitutional claims, and because conflicting evidence is apparent in the record, the district court's denial of injunctive relief on the basis of each of Plaintiffs' constitutional claims was not arbitrary, and therefore cannot be considered an abuse of discretion.

A. THE ORDINANCE IS PREDICATED ON SEVERAL IMPORTANT, LEGITIMATE GOVERNMENT PURPOSES AND IS NARROWLY TAILORED TO FURTHER THOSE PURPOSES

In considering the passage of the Earned Sick Time Ordinance, the City of Austin heard the testimony of hundreds of witnesses and considered a variety of studies and written materials concerning the impact that the Ordinance would have on the city. Supp.CR.1654. Certified copies of these witness transcripts and documents were entered into evidence at the district court as Defendant's Exhibits 6A and 6B.[1] RR Vol. 3 of 4, p. 154. Considering this evidence, City Council found that "denying earned sick time to employees: (1) is unjust; (2) is detrimental to the health, safety, and welfare of the residents of the city; and (3) contributes to employee turnover and unemployment, and harms the local economy." *See* CR.033. (City of Austin Ordinance 20180215-049).

[1] In their Opening Brief, Plaintiffs contend that the Court abused its discretion in entering these exhibits into evidence. *See* TAB Br. at 56-58. Plaintiffs' objections are nonsensical, and at the very least, admitting this evidence was within the discretion of the district court. First, Plaintiffs advance a general objection that the exhibits were "voluminous," but Plaintiffs do not mention that they received copies of the exhibits in advance and had sufficient time to review them and draft a document with more than a dozen objections that were overruled by the court. CR.224. Plaintiffs next argue that "a general reference to voluminous records is inappropriate," citing several cases holding that a court cannot be *required* to search through such a record or believe general citations to it—these cases do not speak at all to the admissibility of such records, nor the ability of a court to rely on such documents *if the court chooses to do so*. Next, Plaintiffs advance an objection under TEX. R. EVID. 902(10)(a), ignoring that this subsection of Rule 902 applies to *business* records and the exhibits at issue were admitted as *Domestic Public Documents* under Rule 902(1). Plaintiffs' remaining objections are not sufficiently explained to permit a response. To the extent Plaintiffs contend that the testimony and documents included in the record as Defendant's Exhibit 6A and 6B are not competent evidence of the rational relationship between the Ordinance and the legitimate government interests served thereby, it should be noted that (1) this Brief explains where the record explicitly supports such a finding, (2) Plaintiffs ignore that this record includes "facts and data" which they claim is necessary for the evidence to be competent, and (3) even if this wasn't competent evidence, Plaintiffs had the burden at the temporary injunction hearing to show that this interest *did not* exist, which they failed to prove.

Amicus filers herein were among the scores of Austin experts, professors, social scientists, family-owned businesses, advocacy organizations, and residents that testified about the proposed Ordinance. First, Workers Defense Project ("WDP"), a nonprofit organization based in Austin, is a membership-based organization that empowers low-income workers to achieve fair employment through education, direct services, organizing, and strategic partnerships. CR.172. WDP is an expert in the needs of Austin's working poor and has spent nearly two decades studying the best ways to address these needs. *Id*. Since its founding in 2002, WDP has enlisted nearly 4,000 members statewide, including more than 1,200 workers in Austin just since 2015. *Id*. This membership has given WDP unique insight into the effects of employers failing to provide earned sick time—WDP's membership is comprised of low-income workers who would immediately qualify for earned sick time under the Ordinance. *Id*.; Supp.CR.1654, 1704. As a representative of the members who make up its membership, as an employer, and as an organization committed to empowering workers in the City of Austin, WDP advocated for the Ordinance at Austin City Council because it would provide WDP's members with substantive employment rights with meaningful enforcement mechanisms, and the ability to better balance the difficulties of low-wage work with their own health and family needs. CR.176; Supp.CR.1654, 1704.

L'Oca d'Oro LLC ("LDO") is a for-profit company that operates a restaurant business in Austin. CR.172. LDO operates an Italian restaurant located in the Mueller neighborhood. *See id*. Since opening, LDO and its owners have been leaders and advocates for fair treatment of employees in the food service industry. *Id*. With this philosophy in mind, LDO provides top-tier compensation and benefits to its employees relative to its competition, including paid sick time. *Id*. LDO has found this policy far from over-burdensome for its business; to the contrary, LDO has found that it brings economic benefits to the business. *Id*. From the years of experience of its owners, LDO has also found that providing paid sick time to its Austin employees has reduced turnover, thereby increasing productivity, saving recruitment costs, and decreasing the spread of sickness among LDO's employees. LDO informed Austin City Council that if the Ordinance was passed, it would further these results, equalize the playing field among competitors in the food service industry, and increase food safety across the industry as businesses like LDO interact with suppliers, employees, and customers alike. *Id*. at 172-173; Supp.CR.1425-1426. At the very least, food transported within the city would be safer as sick employees at one business may interact with food products that ultimately end up somewhere else—like at LDO, for example. *Id*.

The SAFE Alliance ("SAFE") is another testifying expert organization. An Austin non-profit organization created after the merger of Austin Children's Shelter and SafePlace, SAFE offers a multitude of residential and non-residential services to survivors of sexual assault, domestic violence, and child abuse.[2] The organization's mission is to Stop Abuse For Everyone. *Id*. SAFE strives to offer services and resources that enhance its clients' safety, and relies on both collaboration from partner agencies and support from the Texas legislature to advocate for the safety of community members. *Id*. SAFE's mission is undermined by the lack of a city-wide Earned Sick Time Ordinance (more than 40 other American cities have enacted legislation similar to the Ordinance at issue). By mid-year of 2017, SAFE had served 4,205 clients, and in 2017, its "SAFEline" had received 14,537 calls, chats, and texts.[3] While SAFE has no income qualifications for its services, the vast majority of its clients come to SAFE because they cannot afford to pay for similar support services elsewhere. Supp.CR.1684. For the programs for which SAFE does track income, 83% of its 449 adult clients are at or below the federal poverty level, and another 15% are at less than 200% of the federal poverty level. White Decl. The majority of SAFE's clients are the same people, at the low-end of the income spectrum, who have no

[2] *See* "About Us," The SAFE Alliance (2018), https://www.safeaustin.org/about-us/.

[3] *See* "2017 Mid-year Performance Overview," The SAFE Alliance (2017), https://www.safeaustin.org/wp-content/uploads/2018/06/2017_MidYear_PerformanceOverview-_LongVersion.pdf.; 2017 Annual Report_2017_web.pdf.

access to emergency paid sick time. One of the major concerns that callers to SAFE have is their financial inability to leave work when traumatic events occur, like domestic violence incidents. Supp.CR.1684. Since many of SAFE's callers work in the food and service industries, callers often have extreme difficulty requesting time off, if they are permitted to take any time at all. *Id*. at 1684-1685. SAFE staff and clients detail the incredible toll that domestic abuse, sexual assault, and stalking can take on survivors when they have to choose between losing a paycheck or a job and going into work while dealing with mental or physical trauma. *See id*. For certain victims, it may be dangerous to go into work where they can be easily found. One SAFE staff member, for example, had a client who sought medical and legal services when she started experiencing domestic violence and stalking. White Decl. The client works full-time but does not have access to paid time off. As a result of seeking SAFE services, the client fell behind on rent, utilities, and car payments. *Id*. She even could not go to work at all because of safety concerns and was able to return only after her abuser was finally arrested and charged with felony domestic violence. *Id*. Since returning to work, she and her son continue to require counseling for trauma, but must make the decision to seek help or risk losing their home or going hungry. *Id*. Another SAFE staff member relates the story of a client who had just experienced a sexual assault with injury by an ex-partner who had broken into her home. After hours with police

and at SAFE's forensic clinic, the victim had to choose between reporting for work with no sleep or risk losing her job. *Id.* The failure of employers to provide paid sick time—especially to the working poor who can least afford to miss a day's pay—causes situations like these, which are dangerous for employers, victims, and the public at large. *See* Supp.CR.1684-1685. The Ordinance is narrowly tailored to address this type of harm, requiring employers to allow earned sick time to be taken in response to issues of domestic violence, sexual assault, and stalking. *See* Austin City Code § 4-19-2(D)(3).

Another witness, Joe Hernandez, is a resident of Austin, Texas where he works as an electrician. CR.173; Supp.CR.1677. Mr. Hernandez is also the sole caretaker for his great-grandmother who is in declining health and requires regular medical attention. *Id.* In this role, Mr. Hernandez must occasionally miss work, and the lost wages he incurs challenge his ability to pay bills on time, maintain his residence, and provide for his family. *Id.* Mr. Hernandez is housing-insecure and must often choose between the health of his family and putting food on the table. The Ordinance is narrowly tailored to address this type of harm, as it requires employers to permit earned sick time to be used for illnesses with certain family members, like Mr. Hernandez's great-grandmother. Austin City Code § 4-19-2(D)(2).

Luis Olivares works in Austin, Texas in construction as a heating, ventilation, and air conditioning (HVAC) technician. *See* Supp.CR.346; Olivares Decl. When Mr. Olivares caught the flu, he had to miss two days of work to see a doctor. Mr. Olivares is extremely frugal but lives on a modest income. While his employer allowed him *unpaid* sick time, simply missing two workdays' pay made Mr. Olivares short on rent and would have cost him his home but for a friend's assistance. *Id*. The Ordinance aims to prevent personal ruin of those who have to miss work because of circumstances beyond their control. The record shows that more than 60% of Austin workers already have this benefit, but that those who don't are primarily those least able to survive without it. Supp.CR.0122–0128.

Laura Olvera works in the food service industry in Austin. *See* Supp.CR.0347; Olvera Decl. Prior to her current position with a chain restaurant, she worked at similar establishments as a cook. Olvera Decl. When working at one of her previous positions, Ms. Olvera's young daughter developed mental health issues that required regular therapy. Ms. Olvera's employer refused to allow her paid time off to take her daughter to the scheduled appointments, so Ms. Olvera had to take the time off without pay. Because of the missed pay, Ms. Olvera had to pick up shifts performing cleaning services, which further strained her ability to attend the appointments at all. Moreover, even with the extra hours cleaning, she did not make up for the lost wages at the restaurant, and Ms. Olvera

was put in a "Catch-22" where she couldn't afford her daughter's healthcare without taking the restaurant shifts but couldn't physically take her daughter if she did take those shifts. Olvera Decl. The Ordinance is aimed at ensuring the healthcare needs of Austin residents are attended to without putting parents into these situations.

When Courtney Szigetvari was an undergraduate student, she worked as a seasonal employee for Barnes and Noble in a position that offered no paid sick time. While there, she was also stuck in a physically violent relationship that took a toll on her emotional health, causing her to miss work and be physically ill. Supp.CR.1680-1681. This ultimately caused her to leave her job as she was not permitted to take leave during the holiday season. *Id*. Much later, Ms. Szigetvari dedicated significant time to researching domestic violence and testified to City Council that domestic violence costs the national economy roughly $700 million each year, and lost workdays likewise cost about $8 million each year. Looking back on the experience, Ms. Szigetvari recognizes that had she been allowed just one or two paid sick days during her employment, she may not have been forced to leave her job. *Id*. The Ordinance is aimed at preventing this type of preventable unemployment, at targeting victims of domestic violence for assistance, and at staving off the negative effects to the economy that these issues create. Today, Ms. Szigetvari works as a certified advocate to help members of the community

prevent and address incidences of sexual assault. *Id*. at 1681. Over her years of work as a mental health practitioner in the social services field, she has worked with hundreds of clients, the majority of which have had to take at least some time off to deal with an issue directly related to the trauma they experienced, for example, obtaining restraining orders or attending criminal proceedings for their abusers. Szigetvari Decl. She estimates that 70 to 80 percent of these clients had jobs that did not provide earned sick time, so that these clients were forced to choose between risking additional violence against themselves or losing pay or the job itself. *Id*. According to Ms. Szigetvari, this "Sophie's Choice" often re-traumatizes victims, creating a pattern of trauma and re-traumatization that can be hard to break. *Id*.

B. PLAINTIFFS FAILED TO SHOW THAT THEIR CLAIMS ARE COGNIZABLE AS FACIAL CHALLENGES

A plaintiff does not have standing to bring an "as-applied" constitutional challenge to a not-yet-effective law because such a law "has never been applied to anyone." *Barshop v. Medina Cty. Underground Water Conservation Dist*., 925 S.W.2d 618, 626–27 (Tex. 1996). Accordingly, Plaintiffs' claims in this case must be "facial challenges" if Plaintiffs are to have standing to bring them at all. "A facial challenge claims that a statute, by its terms, *always* operates unconstitutionally." *Tenet Hosps. Ltd. v. Rivera*, 445 S.W.3d 698, 702 (Tex. 2014)

(emphasis added). In *City of Los Angeles v. Patel*, the U.S. Supreme Court explained that in determining whether a statute meets the test for a facial constitutional challenge, the court considers "applications of the statute in which it actually authorizes or prohibits conduct," and further, that "the proper focus of the constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." 135 S. Ct. 2443, 2451 (2015) (quoting *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992)). In other words, for a statute to be unconstitutional on its face, it must have an unconstitutional result every time it forces anyone, whether a party to the suit or not, to either act or refrain from acting.

Plaintiffs failed to show that they have a probable right to relief on any of their constitutional claims because they offered no evidence whatsoever (nor did they even plead) that the Ordinance *always* operates unconstitutionally, even if the Court assumed it would operate unconstitutionally as applied to Plaintiffs. This is a foundational pleading requirement inherent in all facial challenges and is thus a necessary element that must be proved by Plaintiffs.[4]

[4] At the district court, Plaintiffs claimed that the Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. 310, 331 (2010) relieves them of the obligation to plead and prove this element of their claims. CR.211. Plaintiffs argued that the distinction between a facial and an as-applied challenge applied only "to the breadth of the remedy employed by the Court," and is not an element that must be pled and proved. *Id.* Plaintiffs clearly misconstrued the Supreme Court's holding. First, in *Citizens United*, the Court was actually concerned with an opposite situation as here—the plaintiffs there had only brought an as-applied challenge, but the Court held that it could hold the statute at issue unconstitutional on its face, even if the plaintiff had

To the contrary, Plaintiffs actually testified at the temporary injunction hearing that the Ordinance affected them and their respective industries in unique ways. *See, e.g.*, RR Vol. 3 of 4, p. 69–70. Plaintiffs' constitutional claims fail as a matter of law because Plaintiffs neither alleged nor proved any facts that would support this element of their facial challenges. This basis alone supports the district court's order denying the temporary injunction on the basis of these claims, as Plaintiffs failed to show a "probable right to relief." *See generally Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002) (parties must show a probable right to relief on the merits for temporary injunctive relief to be granted).

C. PLAINTIFFS FAILED TO PROVE THAT THE ORDINANCE WAS NEITHER NARROWLY TAILORED NOR RATIONALLY RELATED TO A LEGITIMATE GOVERNMENTAL PURPOSE

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only originally alleged an as-applied violation. In this case, realizing that they do not have standing to bring a pre-enforcement as-applied challenge, Plaintiffs allege a facial challenge but only allege facts that would support an as-applied challenge, essentially trying to work around the requirement that the Ordinance must actually be enforced against them before they can challenge its constitutionality on an as-applied basis. *Citizens United* stands for no such shortcutting of the established rules. Second, the premise Plaintiffs cite from *Citizens United* was based on the peculiarities of facial challenges on First Amendment grounds, which do not require the usual proof that a law "always operates unconstitutionally," but rather, permits facial challenges when "a substantial number of its applications are unconstitutional." *See Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 & n.6 (2008). This is a different standard entirely than that applied to Plaintiffs' claims in this case and would permit a proponent to merely prove several different classes of unconstitutional applications rather than showing the required universally unconstitutional application following from the law's mandates, which the Texas Supreme Court requires Plaintiffs to prove. And, even if this more lenient standard were applied, Plaintiffs did not allege or prove "a substantial number" of unconstitutional applications as to any of their claims.

At the temporary injunction hearing, Plaintiffs offered no evidence regarding whether or not the Ordinance was narrowly tailored (much less rationally related) to a legitimate governmental purpose. In one form or another, this evidence was necessary for Plaintiffs to show a likelihood of success on the merits as to each of their constitutional claims, and the absence of such evidence was a non-arbitrary basis for the district court to find that Plaintiffs had not shown a probable right to relief as to these claims. Moreover, the district court was presented with contrary evidence, was free to disbelieve or discount any evidence that Plaintiffs might have presented, and was permitted to engage in rational speculation about the interests advanced by the Ordinance.

First, Plaintiffs' Due-Course-of-Law claim relies on the balancing test set out in *Patel v. Texas Dep't of Licensing and Regulation*, 469 S.W.3d 69 (Tex. 2015), for determining the constitutionality of economic regulations. That test considers "whether the statute's effect as a whole is so unreasonably burdensome that it becomes oppressive in relation to the underlying governmental interest." *Id*. at 73. At the temporary injunction hearing, Plaintiffs offered no evidence whatsoever as to the importance (or lack thereof) of the "underlying governmental interest"—evidence of which the Plaintiffs have the burden of proving in the balancing-of-interests test outlined in *Patel*. *See id*. Further, to the extent that Plaintiffs offered any evidence of an economic "burden," the district court was

within its discretion to disbelieve that testimony entirely or to determine that the burden described by Plaintiffs was not unreasonable. The district court was also within its discretion to determine that, even if the burden alleged by Plaintiffs was significant, the importance of the underlying governmental interest was such that the burden on Plaintiffs was not "unreasonable" or "oppressive" in relation to that interest. The record in this case, including the testimony to City Council described in Section I.A., *supra*, supports such findings by the district court. Accordingly, the district court had a non-arbitrary basis for denying a temporary injunction on the basis of Plaintiffs' Due-Course-of-Law claim.

Second, Plaintiffs' Equal Protection claim rests on the proposition that Plaintiffs are treated differently from others in that they are unable to modify the annual cap for earned sick time required by the Ordinance while unionized employers operating under a collective bargaining agreement are permitted to do so. In order to show a likelihood of success on the merits, Plaintiffs were required to show that this difference in treatment "is not rationally related to a legitimate governmental purpose." *Klumb v. Houston Municipal Employees Pension System*, 458 S.W.3d 1, 13 (Tex. 2015).[5] In the context of this case, this standard applies to

[5] Plaintiffs have argued at the district court that a more stringent standard is applicable in this analysis because the difference in treatment implicates a "fundamental right"—specifically, their associational rights under the First Amendment. This is not so for the same reasons their stand-alone associational claim discussed below is not subject to heightened scrutiny—that Plaintiffs' respective decisions *not* to engage in collective bargaining with a *non-existent* union (while they may be protected by the First Amendment) are not sufficiently expressive to raise to

the purpose for the distinction specifically, and not the purpose of the Ordinance as a whole. While the purpose for the distinction is not explicit in the Ordinance in the way that it is for the purpose of the Ordinance as a whole, the district court was free to engage in "rational speculation unsupported by evidence or empirical data" in determining if a legitimate governmental purpose existed and whether the distinction is rationally related to that purpose. *Id*. (internal quotations omitted). Plaintiffs offered no evidence that the distinction made in the Ordinance was not rationally related to a legitimate governmental purpose, and the rational basis for this distinction is obvious. Where a collective bargaining agreement is in place, employees are less likely to be coerced into accepting a cap lower than that mandated by the Ordinance without significant trade-offs. The City has a legitimate interest in permitting employees to negotiate for better benefits than the Ordinance requires and preventing labor disputes, but in doing so, it also has a legitimate interest in protecting workers from contracts of adhesion that would waive their rights under the Ordinance. The Ordinance draws a rational distinction between workers who have real bargaining power and sophisticated knowledge of labor laws from those who do not. The record bears this out: Kelly Hudson,

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the level of a *fundamental* right implicating heightened scrutiny. Nevertheless, even if a heightened standard were applied, the fact remains that Plaintiffs offered no evidence regarding the importance of the distinction made in the Ordinance, nor how well the Ordinance is tailored to address the issues for which the distinction is made. The district court was within its discretion to find that the distinction was narrowly tailored to achieve an important governmental purpose for the same reasons it could find a rational relation.

owner of Plaintiff LeadingEdge Personnel, testified at the temporary injunction hearing that if he had the ability currently given to unionized workers to modify the annual cap of sick time required by the Ordinance, that he would only consider modifying it "to zero," effectively negating the Ordinance without any need for other concessions that would be necessary under a collective bargaining agreement. *See* RR Vol. 3 of 4, p. 25. The distinction in the Ordinance is aimed at ensuring that its intent is carried out, while also offering flexibility to employees that have the ability to negotiate up from the floor of benefits created by the Ordinance. The district court had a non-arbitrary basis for determining that the distinction is rationally related to a legitimate governmental purpose, and therefore did not abuse its discretion in denying the temporary injunction on the basis of this claim.

Third, Plaintiffs' Associational claim is identical to their Equal Protection claim. Just as there, Plaintiffs offered no evidence that the difference in treatment between Plaintiffs and unionized workers operating under a collective bargaining agreement was not rationally related to a legitimate governmental purpose, and the district court was within its discretion to engage in rational speculation about the interests involved. For the same reasons that the district court did not abuse its discretion as to the Equal Protection claim, it similarly did not abuse its discretion in denying the temporary injunction on the basis of Plaintiffs' Associational claim.

Finally, Plaintiffs' Search and Seizure claim is based on erroneous assumptions that pre-compliance review of an administrative subpoena issued to enforce the Ordinance would not be available to the Plaintiffs. However, Plaintiffs offered no evidence that they and others similarly situated would not be permitted to seek pre-compliance review within the 10 days allowed for compliance with such a subpoena under the Ordinance. Austin City Code § 4-19-7(A)(4). The City of Austin clearly has a legitimate interest in enforcing its laws, and the subpoena provision, which gives the Ordinance "teeth," aims to ensure that ability is maintained. *See id*. The district court clearly had a non-arbitrary basis for determining that this claim was not likely to succeed on its merits, as the district court was well aware that Plaintiffs would be permitted to seek a protective order in that very court if a particular subpoena ran afoul of the Texas Constitution.

II. PLAINTIFFS FAILED TO PROVE AN IMMINENT INJURY

While the Ordinance at issue in this case was originally set to take effect for certain businesses on October 1, 2018 (before being stayed by this Court), the Ordinance clearly explains by its own terms that it is not enforceable against any employer prior to June 2019, and not enforceable for small businesses with less than five employees until June 1, 2020. Austin City Code § 4-19-8 (Parts 3 & 5). Accordingly, at the time of the temporary injunction hearing, almost a year remained before any of the Plaintiffs could possibly be forced into compliance

with the Ordinance through an enforcement action or fine, and nearly two years for many of the smaller employers. Further, Plaintiffs failed to show that—even assuming this timeline—they would be first in line for an enforcement action. Plaintiffs' failure to offer any evidence regarding when the Ordinance would be enforced amounts to a failure to establish an imminent injury. This is a non-arbitrary basis for the district court to conclude that Plaintiffs' alleged injuries due to the Ordinance were not "imminent" as required for temporary injunctive relief. To the extent that Plaintiffs argued that they were currently being injured due to implementation costs, the district court was free to disbelieve this evidence, to favor contrary testimony in the record that no costs had yet been incurred, and to conclude that such implementation costs were not mandated by the Ordinance. Additionally, the district court was within its discretion to find that, due to the timeline for possible enforcement included in the Ordinance itself, this case would likely be decided on its merits before Plaintiffs were required to be in compliance—effectively meaning that the status quo is already preserved for the expected duration of this case.

III. PLAINTIFFS FAILED TO SHOW THE ORDINANCE AS A WHOLE SHOULD BE ENJOINED WHEN SPECIFIC PROVISIONS ARE SEVERABLE

Assuming *arguendo* that Plaintiffs were able to show a likelihood of success on the merits of their constitutional claims challenging specific provisions of the

Ordinance—specifically, their Equal Protection, Associational, and Search and Seizure claims—the provisions challenged by those claims are severable from the Ordinance as whole in accordance with the Austin City Code. Austin City Code § 1-1-12 provides that "the provisions of this Code and of its subunits are severable." Because the Ordinance was enacted as part of the Austin City Code, any provision within the Ordinance that is found to be unconstitutional shall be severed from the Ordinance, leaving the remainder of the Ordinance in effect. If the maximum relief to which Plaintiffs would be entitled on the merits of these claims is an injunction of the particular provision at issue, then it follows that a temporary injunction granted on the basis of any of these claims must be similarly limited. At the district court, Plaintiffs did not dispute the severability of these provisions—specifically, Austin City Code § 4-19-2(P) regarding collective bargaining agreements and § 4-19-7 regarding subpoena powers. Even if the district court had found that a temporary injunction was justified based on one of these claims, it would have been an abuse of discretion to grant an injunction as to the entire Ordinance.

PRAYER

The Parties filing herein advise the Court that it should affirm the ruling of the district court, lift the temporary stay, and remand this case for further proceedings in accordance with the Texas Rules of Civil Procedure.

Respectfully submitted this 11th day of September, 2018.

By: /s/ Ryan V. Cox
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ATTORNEYS FOR AMICI CURIAE

CERTIFICATE OF COMPLIANCE

Pursuant to TEX. R. APP. P. 9.4 undersigned counsel certifies that this Brief complies with the type-volume limitations contained therein, and states that:

1. Exclusive of the portions exempted by TEX. R. APP. P. 9.4(i)(1) this Brief contains 6652 words;

2. This Brief is printed in a proportionally spaced, serif typeface using Times New Roman 14-point font in text and Times New Roman 12-point font in footnotes produced by Microsoft Word software; and

3. Upon request, undersigned counsel will provide an electronic version of this Brief and/or a copy of the wordcount printout to the Court.

/s/ Ryan V. Cox

CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2018, a true and correct copy of the foregoing document was served via the Court's online filing system on all counsel of record in this case, in compliance with TEX. R. APP. P. 9.5(b).

/s/ Ryan V. Cox

STATE OF TEXAS §
§
COUNTY OF TRAVIS §

DECLARATION OF KELLY WHITE

My name is Kelly White. I am over the age of eighteen, live in Travis County, am of sound mind, and am capable of making this declaration. I declare under penalty of perjury that the facts stated in this document are true and correct.

1. I am the Chief Executive Officer of the SAFE Alliance.
2. I have read and reviewed from the above-attached amicus brief the section titled "The SAFE Alliance" and verify that the facts stated therein are true and correct.

Executed in Travis County, State of Texas, on September 11th, 2018.

Kelly White

STATE OF TEXAS §
§
COUNTY OF TRAVIS §

DECLARATION OF LUIS OLIVARES

My name is Luis Olivares. I am over the age of eighteen, live in Travis County, am of sound mind, and am capable of making this declaration. I declare under penalty of perjury that the facts stated in this document are true and correct.

1. I work in Austin, Texas in construction as a heating, ventilation, and air conditioning (HVAC) technician. In my understanding, I meet all eligibility requirements to earn paid sick time under the Earned Sick Time Ordinance. I am not employed subject to a collective bargaining agreement and am not provided any paid sick time by his employer.
2. When I got the flu one year, I had to miss two days of work to see a doctor. While my employer allowed me to take the time off from work, he did not pay me for the days I missed.
3. Because of those two days of missed work, and with it the decrease in pay, I found that I would be short on rent that month, and had to ask a coworker to borrow money so that I could make rent.
4. I take great care to cook my meals at home rather than going out to eat, to conserve energy at home to lower my electric bill, and to budget my earnings to cover both recurring and any unexpected expenses that may come up over the course of the month. Missing just one day of work to care for myself or my son burdens my ability to make ends meet, and I believe I stand to benefit from the Earned Sick Time Ordinance going into effect as planned.

Executed in Travis County, State of Texas, on September 4th, 2018.

Luis Olivares

Luis Olivares

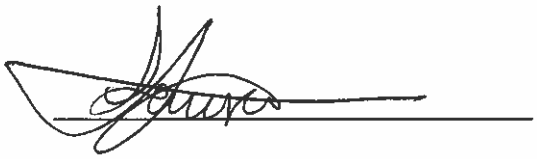
STATE OF TEXAS §
§
COUNTY OF TRAVIS §

DECLARATION OF LAURA OLVERA

My name is Laura Olvera. I am over the age of eighteen, live in Travis County, am of sound mind, and am capable of making this declaration. I declare under penalty of perjury that the facts stated in this document are true and correct.

1. I work in Austin, Texas at a local chain restaurant. Prior to my current position with the restaurant, I worked at similar establishments as a cook. In my understanding, I meet all eligibility requirements to earn paid sick time under the Earned Sick Time Ordinance. I have neither been employed subject to a collective bargaining agreement nor provided any paid sick time by my employers.
2. When working at one of my previous positions, my young daughter developed mental health issues that required regular therapy. My employer refused to allow me paid time off to take my daughter to the scheduled appointments, so I had to take the time off without pay.
3. Because of the missed pay, I had to pick up extra hours performing cleaning services. The extra hours, however, did not make up for the days I went without pay at the restaurant, and I was often forced to postpone my daughter's appointments until I had sufficient funding to pay the doctors' bills.
4. I know that having the Earned Sick Time Ordinance in place could prevent situations like those I experienced when my daughter got sick, and we stand to benefit from the Ordinance going into effect.

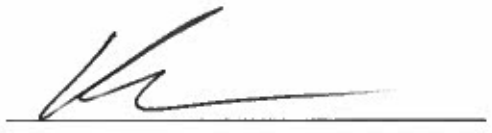
Executed in Travis County, State of Texas, on 09/04, 2018.



Laura Olvera

Certificate of Translation

I hereby certify that I am fluent in the English and Spanish languages, that the foregoing declaration has been translated into English by me, and that I read the foregoing declaration in Spanish to Laura Olvera, who stated that he understood its contents and executed this declaration.



Translator

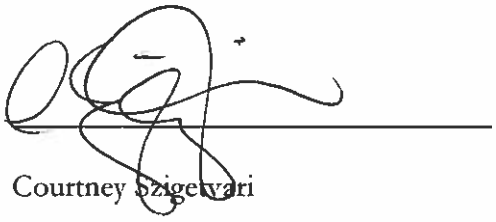
STATE OF TEXAS §
§
COUNTY OF TRAVIS §

DECLARATION OF COURTNEY SZIGETVARI

My name is Courtney Szigetvari. I am over the age of eighteen, live in Travis County, am of sound mind, and am capable of making this declaration. I declare under penalty of perjury that the facts stated in this document are true and correct.

1. I have read and reviewed from the above-attached amicus brief the section titled "Courtney Szigetvari" and verify that the facts stated therein are true and correct.

Executed in Travis County, State of Texas, on September 10, 2018.



Courtney Szigetvari