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

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.,	§ § § § § § § § §	IN THE DISTRICT COURT
Plaintiffs,	§	
and	§	
TEXAS,	§	
Intervenor,	§	
v.	§	TRAVIS COUNTY, TEXAS
CITY OF AUSTIN, TEXAS, STEVE ADLER, MAYOR OF THE CITY OF AUSTIN, and SPENCER CRONK, CITY MANAGER OF THE CITY OF AUSTIN,	§ § § § §	
Defendants,	§	
and	§	
WORKERS DEFENSE PROJECT, L'OCA D'ORO LLC, and JOE HERNANDEZ,	§ § §	
Intervenors.	§	459TH JUDICIAL DISTRICT

PETITION IN INTERVENTION

Intervenors, Workers Defense Project ("WDP"), L'Oca d'Oro LLC ("LDO"), and Mr. Joe Hernandez respectfully file this Petition in Intervention as a matter of right pursuant to TEX. R. CIV. P. 60. By this filing, Intervenors appear in the above-captioned case as defendants. With this

Petition, Intervenors simultaneously seek dismissal[1] of Plaintiffs' claims and declaratory relief relating to the validity of City of Austin Ordinance No. 20180215-049 (February 15, 2018), which requires employers in the City of Austin to allow eligible employees to earn paid sick time under certain circumstances (the "Earned Sick Time Ordinance").

Intervenors—a workers' rights nonprofit organization, a local restaurant and an Austin worker—each have justiciable interests in this litigation that permit them intervention by right. As described below, each would benefit from the City's Earned Sick Time Ordinance, and conversely sustain substantial economic loss were the Earned Sick Time Ordinance to be struck down: the workers' rights nonprofit organization, as a representative of its working members, as an employer, and as an advocacy organization; the local restaurant, as an eligible employer and market participant; and the Austin worker, as an eligible employee. In support of this Petition, Intervenors respectfully show as follows:

I.
INTERVENTION

The Parties

1. Plaintiffs filed this lawsuit on April 24, 2018. Plaintiffs are trade associations and business entities allegedly injured by the Earned Sick Time Ordinance, which is attached as Exhibit A. Plaintiffs seek declaratory judgment that the Earned Sick Time Ordinance is preempted by the state's minimal wage law and unconstitutional pursuant to several provisions of the Texas Constitution.

2. On April 30, 2018, the State of Texas intervened as a plaintiff in this suit, joining in Plaintiffs' preemption claim, but not joining Plaintiffs' constitutional claims.

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[1] See "Intervenor Defendants' Rule 91a Motion to Dismiss," filed simultaneously with this intervention petition.

3. Intervenor WDP is a Texas non-profit corporation, organized under section 501(c)(3) of the Internal Revenue Code, with its principal place of business in Austin, Texas. WDP is a membership-based organization that empowers low-income workers to achieve fair employment through education, direct services, organizing and strategic partnerships. Since its founding in 2002, WDP has enlisted nearly 4,000 members statewide. In Austin alone, over 1,200 workers have joined WDP since 2015. WDP's membership is comprised of low-income workers who are directly affected by the Earned Sick Time Ordinance as qualifying employees eligible for paid sick time thereunder. Accordingly, the Earned Sick Time Ordinance directly advances WDP's mission and personally benefits WDP's members.

4. Intervenor LDO is a Texas Limited Liability Company with its principle place of business in Austin, Texas. LDO owns and operates the restaurant L'Oca d'Oro located at 1900 Simond Ave., Austin, Texas 78723. Since opening, LDO and its owners have been leaders and advocates for fair treatment of employees in the food service industry. With this philosophy in mind, LDO provides top-tier compensation and benefits to its employees relative to its competition, including paid sick time in excess of the minimum required by the Earned Sick Time Ordinance at issue in this case. LDO has found that this policy is not over-burdensome for its business, and in fact, results in economic benefits. LDO stands to benefit from the Earned Sick Time Ordinance going into effect because it will obtain a competitive advantage relative to the *status quo* when other businesses that do not currently provide paid sick time are required to do so by the Earned Sick Time Ordinance, thereby equalizing the playing field in terms of capital that can be spent on other operations, improvements, and promotion. The Earned Sick Time Ordinance will also benefit LDO in contributing to industry stability and safety, especially as the Earned Sick Time Ordinance applies to LDO's suppliers and customers.

5. Intervenor Joe Hernandez is a resident of Austin, Texas where he works as an electrician. The last three digits of his driver's license number are 477. The last three digits of his Social Security number are 198. Mr. Hernandez is a member of the local chapter of the International Brotherhood of Electrical Workers union ("IBEW"), and he meets all eligibility requirements to earn sick time under the Earned Sick Time Ordinance. Mr. Hernandez is not employed subject to a collective bargaining agreement and is not provided any paid sick time by his employer. Mr. Hernandez is also the sole caretaker for his great-grandmother who is in declining health and needs regular medical attention. This role requires Mr. Hernandez to occasionally be absent from work, and the loss of wages resulting from such absences challenges his ability to pay bills on time, maintain his residence, and provide for his family. Mr. Hernandez stands to directly benefit from the Earned Sick Time Ordinance by earning sick time to which he would not otherwise be entitled.

6. Defendant, the City of Austin, is an incorporated "home-rule" city in Travis County, Texas. The remaining Defendants are sued in their official capacity as representatives of the City of Austin. The City has not yet appeared in this case.

Intervenors' Justiciable Interests in this Litigation

7. Intervenors now join this case as defendants denying Plaintiffs' claims and seeking declaratory judgment that the Earned Sick Time Ordinance is in fact valid. *See* TEX. R. CIV. P. 60 ("Any party may intervene by filing a pleading, subject to being stricken by the court for sufficient cause on the motion of any party."); *In re Ford Motor Co.*, 442 S.W.3d 265, 274 & nn. 27–28 (Tex. 2014) (orig. proceeding) ("Intervenors can be characterized as plaintiffs or defendants depending on the claims asserted and relief requested by the intervenor."); *Perkins v. Freeman*, 518 S.W.2d 532, 534 (Tex. 1974) (characterizing an intervenor as a defendant because

there "was no antagonism between the intervenors and defendant" and "[t]he defendant and intervenors were united in a common cause of action against the plaintiff").

8. Intervenors are entitled to intervene because (a) they have justiciable interests in the controversy sufficient to have "brought the same action or defeated any part thereof" as an original party, (b) "the intervention will not complicate the case by an excessive multiplication of the issues," and (c) this intervention is "essential to effectively protect the intervenor's interest." *See Guar. Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 657 (Tex. 1990) (overturning district court's decision to deny intervention).

9. ***Workers Defense Project***. As a representative of the workers who make up its membership, as an employer, and as an organization committed to empowering workers in the City of Austin, WDP has multiple justiciable interests in the current litigation. These interests are sufficient to confer two types of standing—associational standing, on behalf of its members, and organizational standing in its own right as an organization affected by the Paid Sick Time Ordinance. WDP has associational standing because: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 447 (Tex. 1993) (quoting *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977)). WDP has organizational standing because it will suffer concrete, particular and imminent injury by having to expend additional organizational resources if the Earned Sick Time Ordinance is not permitted to go into effect. *See OCA-Greater Houston v. Texas*, 867 F.3d 604, 610–12 (5th Cir. 2017) (holding that voter advocacy group had organizational standing in its own right because of additional outreach made necessary by the

allegedly invalid Texas law at issue); *Ass'n of Cmty. Organizations for Reform Now v. Fowler*, 178 F.3d 350, 356 (5th Cir. 1999) ("An organization has standing to sue on its own behalf if it meets the same standing test that applies to individuals."); *see also Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 447 (Tex. 1993) (indicating that Texas courts use the terms "associational standing" and "organizational standing" interchangeably but nevertheless relying on federal case law for establishing whether an injury-in-fact exists for standing purposes). WDP's potential injury is directly a result of the risk of the Earned Sick Time Ordinance failing to go into effect, and resolution in favor of Defendant Intervenors in this case will redress that injury. *See Bennett v. Spear*, 520 U.S. 154, 167 (1997) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (discussing the "irreducible constitutional minimum" for standing requiring injury, causation, and redressability).)

10. As a representative of its members, WDP has a justiciable interest in seeing the Earned Sick Time Ordinance upheld. The Earned Sick Time Ordinance provides WDP's members with substantive employment rights, specifically, with the right to paid sick time under certain conditions. Because many of WDP's members meet the requirements for entitlement to paid sick time from their respective employers, they have a personal financial interest in seeing the Earned Sick Time Ordinance upheld. These members will be injured by the loss of ability to earn sick time if the Earned Sick Time Ordinance is invalidated. Moreover, because WDP works to empower low-income workers to secure their rights to fair employment practices, the interests in earned sick time that WDP seeks to protect in this litigation fall squarely within WDP's stated mission and purpose. Neither defending the Earned Sick Time Ordinance nor seeking declaratory relief confirming its lawfulness requires the participation of WDP's individual members.

11. As an employer and a mission-driven nonprofit, WDP will suffer harm if the Earned Sick Time Ordinance is struck down. Failure to uphold the Earned Sick Time Ordinance would mean that if WDP were to continue to permit its own employees paid sick time, it would face unfair competition from similar employers who do not allow its employees such time compared to the status quo under the Earned Sick Time Ordinance. Finally, as an advocacy organization, WDP also has a justiciable interest in seeing the Earned Sick Time Ordinance upheld as failure to uphold it would force WDP to expend additional resources in advocating for new reforms that it would not have spent had the law gone into effect as planned. Specifically, WDP would foreseeably have to expend resources on efforts such as educating its members about the invalidated Earned Sick Time Ordinance, organizing its members for a new campaign for earned sick time, and advocating for the City and State to adopt the same or a similar earned sick time ordinance. These would all require an enormous amount of time, money, and effort, and which would severely strain WDP's resources set aside for other advocacy projects.

12. ***L'Oca d'Oro LLC***. LDO also has clear justiciable interests in this litigation that are sufficient to confer standing. As an employer, it has a strong financial interest in seeing the Earned Sick Time Ordinance upheld in order to prevent unfair competition with similar establishments that do not currently offer paid sick time. Paying each of its 25 to 30 full and part-time employees $8 an hour or more, LDO stands to spend anywhere from roughly $9,200 to $11,500 each year in earned sick time when LDO's competitors do not. Failure of the Earned Sick Time Ordinance to go into effect would put LDO at a financial disadvantage compared to other businesses in the local industry compared to the *status quo* under the Earned Sick Time Ordinance. LDO would also be injured if it is denied the ability to operate in a safer industry—one that is particularly sensitive to the effects of employees working while sick.

13. ***Mr. Joe Hernandez.*** As a worker in the City of Austin, Mr. Hernandez also has justiciable interests in the current litigation. Mr. Hernandez meets the requirements for entitlement to paid sick time from his employer, and would suffer financial injury were the Earned Sick Time Ordinance invalidated. Specifically, Mr. Hernandez would lose a right to a *minimum* of almost $60 a day in earned sick time each time that he must forego a day of work in order to care for his great-grandmother, or nearly $350 a year if he used the maximum sick time provided under the Earned Sick Time Ordinance.

Other Factors Favoring Intervention

14. Because Defendant Intervenors seek declaration of the validity of the very same Earned Sick Time Ordinance that Plaintiffs are challenging in this case, Defendant Intervenors' claims arise from the same transaction or occurrence and involve questions of law and fact that overlap entirely with Plaintiffs' claims—namely, whether the Earned Sick Time Ordinance is preempted by the state minimal wage law and whether it is lawful under the state's Constitution. Intervention in this case will not complicate the case by adding any new claims of law or any significant new factual developments. *See Texas Supply Center, Inc. v. Daon Corp.*, 641 S.W.2d 335, 337 (Tex. App.—Dallas 1982) (allowing intervention where intervention was permitted, and where intervenor bank established a viable financial interest in the outcome of the litigation); *Inter-Continental Corp. v. Moody*, 411 S.W.2d 578, 589 (Tex. Civ. App.—Houston 1966) (allowing intervention where intervenor shareholder could have initiated the suit, and where intervention would prevent the need to file a separate suit). Indeed, "[j]udicial economy requires that [intervenors] intervene and participate in the trial in order to avoid a multiplicity of lengthy lawsuits." *Guar. Fed. Sav. Bank*, 793 S.W.2d at 658.

15. Intervention is permitted when, as is the case here, intervention is essential to protecting the Intervenors' interests. *See, e.g., Guar. Fed. Sav. Bank*, 793 S.W.2d at 657–58 (allowing intervention where "almost essential to effectively protect [intervenor]'s interests").

16. The cases where intervention has been denied contain facts and circumstances not present here and are easily distinguishable. *See, e.g., In re Union Carbide Corp.*, 273 S.W.3d 152, 155 (Tex. 2008) (striking intervention in personal injury suit by family of second alleged victim claiming similar (but not identical) injuries, because resolution of the litigation by the original claimant would not necessarily resolve controversy for different claimant with different injuries); *Law Offices of Windle Turley, P.C. v. Ghiasinejad*, 109 S.W.3d 68, 70 (Tex. App.—Fort Worth 2003, no pet.) (affirming trial court's decision to deny intervention because permitting the intervention "would have caused unnecessary confusion and complicated the already difficult medical malpractice issues").

17. Venue over this case remains proper in Travis County pursuant to Texas Civil Practice & Remedies Code § 15.002.

II.
GENERAL DENIAL

18. Subject to such stipulations and admissions as may be made in this litigation, Defendant Intervenors generally deny each and every allegation in Plaintiffs' Original Petition and in the State of Texas's Plea in Intervention in accordance with Texas Rule of Civil Procedure 92 and demand strict proof of such allegations in accordance with the appropriate burden of proof as the Court may order in accordance with the laws of the State of Texas.

III.
COUNTER-CLAIM
Declaratory Judgment

19. Intervenors incorporate by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

20. There is a real and substantial justiciable controversy between the Plaintiffs and the State of Texas, on one hand, and the Intervenors and the City of Austin, on the other hand, concerning the validity and enforceability of the City's Earned Sick Time Ordinance.

21. Intervenors seek a declaratory judgment pursuant to the Texas Declaratory Judgments Act, Texas Civil Practice and Remedies Code § 37.001 et seq. regarding the rights and obligations of the parties, including the following declarations:

a. That the Earned Sick Time Ordinance is not preempted and is enforceable, in its entirety, because it does not conflict with the State of Texas minimum wage laws;

b. That the Earned Sick Time Ordinance is not prohibited by the Texas Constitution as applied to Plaintiffs by violating the "due course of law" provision of Article 1, § 19;

c. That the Earned Sick Time Ordinance is not prohibited by the Texas Constitution as applied to Plaintiffs by violating Plaintiffs' rights to equal protection under Article I, § 3; and

d. That the Earned Sick Time Ordinance is not prohibited by the Texas Constitution as applied to Plaintiffs by violating protection against unreasonable searches and seizures under Article I, § 9.

IV.
PLAINTIFFS ARE NOT ENTITLED TO A TEMPORARY INJUNCTION

22. In addition to their substantive claims, Plaintiffs and the State of Texas seek temporary and permanent injunction of the Earned Sick Time Ordinance, currently scheduled to become effective on October 1, 2018. In order to be entitled to a temporary injunction, Plaintiffs and the State of Texas must show a probable right to relief—that is, they must prove that they are likely to succeed on the merits of this lawsuit. *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 686 (Tex. 1990). Plaintiffs' claims are wholly without merit and will fail upon the Court's

determination of the issues as a matter of law. Accordingly, Plaintiffs are not entitled to a temporary or permanent injunction delaying the effective date of the Earned Sick Time Ordinance.

V.
REQUEST FOR ATTORNEY FEES & COSTS

23. Intervenors incorporate by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

24. Intervenors are entitled to recover their reasonable attorney's fees as permitted by law, including reasonable fees for the cost of successfully making or responding to an appeal to the court of appeals and the Texas Supreme Court pursuant to Section 37.009 of the Texas Civil Practice and Remedies Code.

VI.
AFFIRMATIVE RIGHT TO DISMISSAL OF CLAIMS

25. Pursuant to Texas Rule of Civil Procedure Rule 91a, Intervenors affirmatively reserve their right to have Plaintiffs' claims in this case dismissed because Plaintiffs' claims have no basis in law or fact in that (1) the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle Plaintiffs to the relief they seek, and (2) to the extent that Plaintiffs' claims are dependent on pleaded facts, no reasonable person could believe the facts pleaded. In exercise of this right, Intervenors file with this Petition in Intervention a Motion to Dismiss.

VII.
AFFIRMATIVE RIGHT TO SEVERANCE

26. To the extent Plaintiffs show a probable right to relief on any specific claim, only the challenged portion of the Earned Sick Time Ordinance should be enjoined. *See* Austin City Code § 1-1-12 ("the provisions of this Code and of its subunits are severable").

VIII.
JURY DEMAND

27. Intervenors respectfully request a trial by jury.

IX.
REQUEST FOR DISCLOSURE

28. Intervenors request that Plaintiffs and Plaintiff Intervenors disclose the information and materials described in Rule 194.2 of the Texas Rules of Civil Procedure within 30 days of receipt of this request.

X.
PRAYER

WHEREFORE, PREMISES CONSIDERED, Intervenor Defendants respectfully request the following relief: (1) that this matter be set down for trial by jury; (2) that, upon trial/hearing, the Court enter a judgment pursuant to the Declaratory Judgment Act declaring that the Earned Sick Time Ordinance is valid and enforceable because in that it is not preempted by State law, nor is it unconstitutional pursuant to the Texas Constitution, Article I, §§ 3, 9, & 19; (3) that Plaintiffs' application for temporary and permanent injunction be denied; (4) that Intervenor Defendants be awarded their costs and attorney's fees in accordance with applicable law; and (5) that Intervenor Defendants be awarded all such other relief in law or equity as Intervenors may show themselves entitled.

Respectfully submitted,

By: _____

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ATTORNEYS FOR INTERVENORS WORKERS DEFENSE PROJECT, L'OCA D'ORO LLC, and JOE HERNANDEZ

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of May, 2018 a true and correct copy of the foregoing *Petition in Intervention* was served upon Defendants via email to Meghan Riley, attorney for Defendants, via email at meghan.riley@austintexas.gov and upon all counsel of record in accordance with TEX. R. CIV. P. 21(a).

/s/ _____

Mimi Marziani

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

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.,	§	IN THE DISTRICT COURT
Plaintiffs,	§	
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TEXAS,	§	
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Defendants,	§	
and	§	
WORKERS DEFENSE PROJECT, L'OCA D'ORO LLC, and JOE HERNANDEZ,	§	
Intervenors.	§	459TH JUDICIAL DISTRICT

INTERVENOR DEFENDANTS' RULE 91a MOTION TO DISMISS

Intervenor Defendants, Workers Defense Project ("WDP"), L'Oca d'Oro LLC ("LDO"), and Joe Hernandez, respectfully file this Motion to Dismiss pursuant to TEX. R. CIV. P. 91a as to all of the claims advanced by the original Plaintiffs, Texas Association of Business ("TAB") *et*

al, and the Intervenor Plaintiff, the State of Texas (collectively, "Plaintiffs"), in their respective live pleadings. Plaintiffs' claims have no basis in law or fact and should be dismissed pursuant to Texas Rule of Civil Procedure Rule 91a. In support of this Motion, Intervenors respectfully show as follows:

I.
INTRODUCTION

This case arises out of Plaintiffs' desire to subvert the political will of the people of Austin, expressed through their elected representatives. For their own personal profit, Plaintiffs seek to employ the judicial process to delay implementation of the City's Earned Sick Time Ordinance, No. 20180215-049 (February 15, 2018) (the "Earned Sick Time Ordinance" or "Ordinance"), which is currently scheduled to go into effect on October 1, 2018 for employers having more than five employees.[1] The Ordinance requires employers in the City of Austin to provide "earned sick time" to employees under certain circumstances, up to an annual cap which varies based on the size of the employer.

After exhaustive hearings on the issue, the City of Austin adopted the Earned Sick Time Ordinance in February 2018, finding 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." Austin City Code, Ordinance No. 20180215-049, Part 1(B). This Ordinance directly benefits people like Intervening Defendant Joe Hernandez, an electrician who must occasionally miss work to fulfill his role as primary caregiver for an elderly family member. Indeed, in addition to Mr. Hernandez, an estimated 220,000 workers in the City of Austin who currently lack access to

[1] A Copy of the Earned Sick Ordinance at issue in this case is made a part of both the Plea in Intervention filed by Movants and the State of Texas's Plea in Intervention, and it is made a part of this Motion by reference pursuant to TEX. R. CIV. P. 58 & 59.

earned sick leave are expected to immediately benefit from the new law.[2] Women, people of color, and lower-wage workers will be especially benefitted.[3]

Plaintiffs contend that the Ordinance is preempted by the Texas Minimum Wage Act—a state law that applies to the amount of *wages* that can be mandated in Texas but does not address sick leave policies or any other employment benefits whatsoever. Additionally, the TAB Plaintiffs advance novel and unsupported arguments that the Earned Sick Time Ordinance violates their "economic" due process rights and others under the Texas Constitution—claims that, tellingly, are not joined by the State of Texas.[4]

For the reasons that follow, none of the Plaintiffs' claims have any basis in law or fact and should be summarily dismissed by the Court.

II.
STANDARD FOR DISMISSAL UNDER RULE 91a

Pursuant to Rule 91a, "a party may seek dismissal of a cause of action on the grounds that it has no basis in law or fact." *Ruth v. Crow*, No. 03-16-00326-CV, 2018 WL 2031902, at *1 (Tex. App.—Austin May 2, 2018, no pet. h.) (citing TEX. R. CIV. P. 91a.1; *City of Dallas v. Sanchez*, 494 S.W.3d 722, 724 (Tex. 2016) (per curiam)). "A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought." *Id.* (quoting Tex. R. Civ. P. 91a.1). When a claim turns only on a question of law, it has "no basis in law" if it is based on an "indisputably

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[2] *See* KXAN NBC News, "Austin considers requiring private companies to provide paid sick leave," available at http://www.kxan.com/news/business/austin-considers-requiring-private-companies-to-provide-paid-sick-leave_20180312074408308/1031397383 (noting that 220,000 people will be eligible for earned sick time under the City's Ordinance).

[3] *Id.* ("30 percent of the white population do[es]n't have sick time. That's compared to 40 percent of blacks and more than half of Hispanics.").

[4] Notably, the State has argued at length against the type of economic due process that the TAB Plaintiffs now advance. *See* Brief of State of Texas, *Patel v. Tex. Dep't of Lic. & Reg*, No. 12-0657, at 49 (Tex. Nov. 4, 2013) (arguing that when the police power is invoked to regulate health and safety, those affected "should take their complaint to the Legislature, not the Courts" and that "the Court should not second-guess the Legislature's policy decision).

meritless legal theory." *Scott v. Gallagher*, 209 S.W.3d 262, 266 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *see also Warner v. TDCJ-CID*, No. 11–12–00176–CV, 2014 WL 3865779, at *2 (Tex. App.—Eastland July 31, 2014, no pet.). "A cause of action has no basis in fact if no reasonable person could believe the facts pleaded." TEX. R. CIV. P. 91a.1.

In applying Rule 91a—a relatively new procedural remedy in Texas—courts often rely on interpretation of its federal counterpart, Federal Rule of Civil Procedure 12(b)(6). *See GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 754 (Tex. App.—Beaumont 2014, pet. denied) ("While not identical, Rule 91a is analogous to [federal] Rule 12(b)(6); therefore, we find case law interpreting Rule 12(b)(6) instructive."); *see also Ruth v. Crow*, No. 03-16-00326-CV, 2018 WL 2031902, at *5 & n.10 (Tex. App.—Austin May 2, 2018, no pet. h.); *Kidd v. Cascos*, No. 03-14-00805-CV, 2015 WL 9436655, at *2 (Tex. App.—Austin Dec. 22, 2015, no pet.). Pursuant to FRCP 12(b)(6), a meritless claim should be dismissed "if all the plaintiff's allegations are taken as true and the petition fails to plead 'enough facts to state a claim to relief that is plausible on its face.'" *Kidd v. Cascos*, 2015 WL 9436655, at *2 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007)). Accordingly, when a claim is purely a question of law, no facts are needed to determine the claim's plausibility, and it is subject to dismissal if the legal theory upon which it is based does not entitle the claimant to relief. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("[F]or the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, [but] we 'are not bound to accept as true a legal conclusion couched as a factual allegation.'"). "The purpose of Rule 12(b)(6) is to streamline litigation by dispensing with needless discovery and factfinding." *Kidd v. Cascos*, 2015 WL 9436655, at *2 (internal quotations omitted). The federal courts have applied Rule 12(b)(6) to dismiss both meritless preemption claims and constitutional challenges. *See, e.g., Frank v. Delta*

Airlines Inc., 314 F.3d 195, 202 (5th Cir. 2002) (rendering judgment on preemption claim based only on the pleadings considered in a 12(b)(6) motion to dismiss); *Wiley v. Potter*, No. 3:06cv00679–DPJ–JCS, 2008 WL 4539559, at *1 (S.D. Miss. Oct. 7, 2008) (collecting Fifth Circuit cases evaluating preemption claims under Rule 12); *Salinas v. Texas Workforce Comm'n*, No. A–11–CA–559–LY, 2013 WL 4511638, at *7 (W.D. Tex. Aug. 22, 2013) (dismissing due process claims).

III.
ARGUMENT

A. Austin's Earned Sick Time Ordinance is Not Preempted by the Texas Minimum Wage Act

Plaintiffs contend that the Texas Minimum Wage Act, TEX. LABOR CODE § 62.051, in addition to preempting local minimum wage laws, also preempts local requirements for fringe benefits, such as Austin's Earned Sick Time Ordinance. State Plaintiffs further contend that the Ordinance is preempted as it applies to certain entities exempted from the Texas Minimum Wage Act, such as religious employers or household workers. *See* TEX. LABOR CODE §§ 62.152 (religious exemption); 62.154 (domestic exemption). As described below, Plaintiffs' position is belied by the plain text of the statute and the City's Ordinance, contrary to case law, and reliant upon an overly broad understanding of state preemption doctrine—accordingly, their preemption claim should be dismissed.

1. Background

Following the passage of local minimum wage laws around the state, the Texas Legislature passed the Texas Minimum Wage Act ("TMWA"), TEX. LABOR CODE § 62.051 in 1993 to preempt local minimum wage laws and create a standard, state-wide minimum wage equal to the minimum wage required by the federal Fair Labor Standards Act ("FLSA"), 29

U.S.C. § 206. While the FLSA created a floor for minimum wage, the TMWA created a ceiling for minimum wage requirements in Texas equal to that federally-mandated floor. *See* TEX. LABOR CODE § 62.051. Accordingly, regarding the minimum wage due to employees, the TMWA provides in its entirety (subject to some exemptions): "an employer shall pay to each employee the federal minimum wage under Section 6, Fair Labor Standards Act of 1938 (29 U.S.C. Section 206)." TEX. LABOR CODE § 62.051. The TMWA does not define "wage." *Id.* The FLSA also does not define "wage" except to provide that, under certain circumstances, an employer may include the cost of "lodging" in determining compliance with the FLSA minimum wage. *See* 29 U.S.C. § 203(m).

2. Overview of Applicable Preemption Doctrine

"Home-rule cities possess the power of self-government and look to the Legislature not for grants of authority, but only for limitations on their authority." *BCCA Appeal Group, Inc. v. City of Houston*, 496 S.W.3d 1, 7 (Tex. 2016)[5] (citing TEX. LOC. GOV'T CODE § 51.072(a)); *Dall. Merch.'s & Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 490–91 (Tex. 1993)). The Texas Constitution mandates that no city ordinance "shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State." Tex. Const. art. XI, § 5(a). Therefore, a home-rule city's ordinance is only unenforceable to the

[5] While the Court in *BCCA Appeal Group* found the City of Houston's clean air ordinance invalid, the facts on which it did so differ vastly from the present case. First, unlike in *BCCA Appeal Group*, in this case the State Legislature has neither issued any "clear and unmistakable language" expressing the intent to limit the power of home-rule municipalities to allow sick pay, nor "clearly limited" the ability of such municipalities to establish an ordinance such as the Earned Sick Time Ordinance when "looking at the statutory regime as a whole"—the "statutory regime" at issue in this case is limited to a mere adoption of the FLSA minimum wage, a maximum-minimum wage in Texas. Second, while in *BCCA Appeal Group* the ordinance sought to establish a *local* enforcement mechanism for a *state* law already in place, in this case, the Earned Sick Leave Ordinance establishes a local law permitting earned sick time for which there is no state law equivalent. Finally, unlike in *BCCA Appeal Group* where the local ordinance directly conflicted with the state law, in this case, enforcement of both the Earned Sick Time Ordinance and the Texas Minimum Wage Act is not only feasible, it is also in line with the Supreme Court's requirement that the laws be "ancillary to and in harmony with" one another.

extent that it is plainly inconsistent with the state statute preempting that particular subject matter. *Dall. Merch.'s & Concessionaire's Ass'n*, 852 S.W.2d at 491.

Importantly, "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. In other words, both will be enforced if that be possible under any reasonable construction . . . ." *BCCA Appeal Group, Inc. v. City of Houston*, 496 S.W.3d 1, 7 (Tex. 2016) (internal quotations omitted). "Furthermore, [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.* (citing *City of Brookside Village v. Comeau*, 633 S.W.2d 790, 796 (Tex.1982)).

In order for an ordinance to be preempted by state law, the Legislature's intent to preempt the ordinance must be apparent with "unmistakable clarity." *Id.* To determine whether such unmistakable clarity exists in the Legislature's intent, the Court should "look to the plain meaning of the text as the sole expression of legislative intent, unless the Legislature has supplied a different meaning by definition, a different meaning is apparent from the context, or applying the plain meaning would lead to absurd results." *Id.* (citing *Abutahoun v. Dow Chem. Co.*, 463 S.W.3d 42, 46 (Tex.2015)) (internal quotations omitted).

3. The Earned Sick Time Ordinance is Not Preempted

When the Court is required to interpret statutes and ordinances for the purpose of preemption, "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage." TEX. GOV'T CODE § 311.011. The plain language of the TMWA is clear: it controls the minimum hourly payment that Texas employers are required to pay their workers and imposes a maximum-minimum wage that can be implemented statewide. *Entergy*

Gulf States, Inc. v. Summers, 282 S.W.3d 433, 437 (Tex. 2009) ("Where text is clear, text is determinative of [the Legislature's] intent. . . . This general rule applies unless enforcing the plain language of the statute as written would produce absurd results."). Because "wage" is not expressly defined in Chapter 62 of the Labor Code, which contains the TMWA in full, it should be accorded its commonly accepted meaning—"[a] fixed regular payment earned for work or services, typically paid on a daily or weekly basis."[6] Employment benefits such as paid sick leave do not fall under the common definition.

To justify Plaintiffs' expansive reading of "wages," they look to an entirely different legislative act—the Texas Payday Law, contained in chapter 61 of the Labor Code—for support that "wages," as that term in contemplated in the TMWA, includes other types of employment benefits.[7] But Plaintiffs do not allege any basis for determining that the Legislature intended to borrow definitions from a wholly different part of the Labor Code. Nor would that make sense: the Texas Payday Law has a wholly different purpose than the TMWA: it simply "require[es] certain types of employers to promptly and regularly pay employees the full amount of wages due." *See Igal v. Brightstar Info. Tech. Group, Inc.*, 250 S.W.3d 78, 82 (Tex. 2008). The reason the Payday Law's definition of "wages" includes other benefits like sick leave pay is that the Legislature determined that if these benefits are contractually owed to an employee, they must be paid regularly, just like paid wages. This is made clear by the definition itself, which limits the non-wage benefits covered by the statute to those "owed under a written agreement." TEX. LABOR CODE § 61.001(7)(B). Accordingly, there is no basis in law for imputing the meaning of "wages" in the Payday Law to the TMWA. *See Matagorda County Appraisal Dist. v. Coastal Liquids Partners, L.P.*, 65 S.W.3d 329, 335–36 (Tex. 2005) (reversing a court of appeals

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[6] Oxford Dictionary Online, "Wage," available at https://en.oxforddictionaries.com/definition/wage.
[7] *See Plaintiffs Original Petition* at ¶ 35.

decision that construed a statute by "import[ing] a definition from a different statute adopted for different purposes"); *Cooke v. City of Alice*, 333 S.W.3d 318, 322 (Tex. App.—San Antonio 2010, no pet.). (Courts should "presume that every word in a statute was chosen by the Legislature for a purpose [and if] the Legislature uses a particular term in one section of a statute and excludes it in another, [the Court] must give the term meaning where used and must not imply it where it was excluded."); *Rey v. State*, 280 S.W.3d 265, 270 (Tex. Crim. App. 2009) (Keller, P.J. concurring) ("If the Legislature intended the definition of a phrase found in one statute to apply in a different statute, one would expect the appearance of the phrase in both statutes to be identical.").

Instead, the TMWA incorporates federal law in its regulatory scheme. The FLSA itself also does not define "wage" except to, in some circumstances, include the cost of "lodging" in determining compliance with the FLSA minimum wage. *See* 29 U.S.C. § 203(m). Because of this, courts have had to determine on a case-by-case basis whether certain time is compensable. For example, courts have had to determine whether commute time or time putting on work-mandated protective gear is required to be paid the minimum wage under the FLSA. *See, e.g.*, *Griffin v. S & B Engineers & Constructors, Ltd.*, 507 Fed. Appx. 377, 378 (5th Cir. 2013) (travel in company buses to and from work was not compensable under the FLSA). Courts have also made clear that benefits like earned sick leave are not included in FLSA's mandates. *See, e.g.*, *Copeland v. ABB*, Inc., No. 04-4275 CV C NKL, 2006 WL 290596, at *3 (W.D. Mo. 2006) (citing and agreeing with Department of Labor website on the proposition 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").

Because the TMWA itself does not define wages, the Court must apply the "plain meaning" requirements of statutory construction. *See PlainsCapital Bank v. Martin*, 459 S.W.3d 550, 556 (Tex. 2015); *City of Hous. v. Bates*, 406 S.W.3d 539, 543–44 (Tex. 2013); *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011). Applying this standard, earned sick leave cannot be considered a "wage" because it falls outside of "a fixed regular payment earned for work or services, typically paid on a daily or weekly basis." *See supra* at n.5. Moreover, reading a more expansive definition of wage into TMWA and FLSA would yield absurd results. Any benefit that could be considered a "wage" would have to be interchangeable under the FLSA such that an employer could compensate an employee entirely by providing that benefit. For example, under the FLSA, because the cost of lodging is included in the definition of wages, an employer could potentially provide *only* lodging and still be in compliance with the minimum wage requirement. *See* 29 U.S.C. § 203(m). The same applies to tips, which may partially reduce wages owed under the FLSA. *See* 29 U.S.C. § 206. Accordingly, earned sick time cannot be a "wage" under the FLSA unless its value could pay an employee's entire FLSA mandated wages. This would be an absurd result, as the idea of earned sick time would be meaningless if its value reduced an employee's pay—this would mean that "paid sick leave" was exactly the same as "unpaid sick leave" for all practical purposes. An employer cannot simply interchange fringe benefits and wages owed under the FLSA unless the FLSA specifically allows such interchange. *See, e.g.*, *York v. City of Wichita Falls*, 763 F.Supp. 876, 887 (N.D. Tex. 1990) (citing *Dunlop v. Gray–Gato, Inc.*, 528 F.2d 792, 794 (10th Cir.1976)) (noting that an agreement by which "no overtime wages would be paid but fringe benefits received instead violates FLSA overtime requirements and such fringe benefits may not be credited against overtime pay required by the [FLSA].").

Similarly, it cannot be the case that any ordinance that costs employers money for the benefit of employees is a "wage" under the TMWA or FLSA. If this were the case, enactment of safety standards—such as requiring employers to provide employees with hardhats and safety glasses—would also be a "wage" preempted by the TMWA. This is also an absurd result of Plaintiffs' interpretation that the Earned Sick Time Ordinance constitutes a "wage" under the TMWA. Accordingly, Plaintiffs' contention that earned sick time increases their labor costs, and therefore is a preempted "wage" requirement, has no basis in law or fact.

Second, with the exception of specific Congressional action declaring certain time non-compensable under the FLSA,[8] the FLSA (and therefore the TMWA) only regulates the *hourly rate of pay* that is to apply in Texas. Accordingly, the TMWA does not preempt any regulation requiring that certain time is compensable; rather, it applies *after* determining the amount of time that is compensable, providing the second multiplier in the compensable-hours-multiplied-by-rate-of-pay calculation to determine an employees' minimum pay. For example, absent specific preemption, a city could legislate that all time spent on mandatory water breaks was compensable, and this time would then be subject to the minimum wage mandated in the FLSA and the TMWA. Similarly, the Earned Sick Time Ordinance here merely mandates that a certain number of hours spent away from work and used for specific health care purposes, up to an annual cap, is now "compensable" time under the FLSA and the TMWA. The Ordinance does not modify the actual rate of pay, which is what is regulated by the TMWA and FLSA. Accordingly, far from being preempted by the TMWA, the Ordinance is "ancillary to and in harmony with the general scope and purpose" of the TMWA. *See City of Brookside Village v. Comeau*, 633 S.W.2d 790, 796 (Tex.1982). This is the only "reasonable" construction of the

[8] *See, e.g.*, *Chambers v. Sears Roebuck and Co.*, 28 Fed. Appx. 400, 408–10 (5th Cir. 2011) (explaining Congress's Portal-to-Portal law and related statutes the exclude commute time from compensability under the FLSA).

Ordinance that allows it to coexist with the TMWA and therefore, the Court should adopt this construction. *See BCCA Appeal Group, Inc. v. City of Houston*, 496 S.W.3d 1, 7 (Tex. 2016).

Finally, Plaintiffs contend that the Ordinance's failure to provide exemptions as they appear in the TMWA for certain groups (such as religious or domestic workers) puts the Ordinance in conflict with the TMWA. This argument is wholly without merit because the Ordinance only requires that earned sick time be paid "in an amount equal to what the employee would have earned if the employee had worked the scheduled work time, exclusive of any overtime premium, tips, or commissions, but no less than the state minimum wage." Austin City Code § 4-19-2(J). Accordingly, whatever exemptions exist in the state minimum wage are also applicable to paying earned sick leave—for example, if a volunteer or priest is paid $0/hour in accordance with the TMWA, their earned sick leave under the Ordinance may also be paid at a rate of $0/hour because this is the "state minimum wage" for that individual after the appropriate exemptions in the TMWA are applied. Plaintiffs' contention has no basis in law or fact, as it is premised on an incomplete reading of the Ordinance.

For these reasons, Plaintiffs' preemption claim is based on a meritless legal theory, has no basis in law or fact, and should be dismissed pursuant to Rule 91a. *See* TEX. R. CIV. P. 91a.1.

B. The Court Lacks Jurisdiction to Hear Plaintiffs' Constitutional Claims

The TAB Plaintiffs' constitutional claims are not ripe, and therefore the Court lacks subject matter jurisdiction to hear them. "A case is not ripe when determining whether the plaintiff has a concrete injury depends on contingent or hypothetical facts, or upon events that have not yet come to pass." *Waco Independent School Dist. v. Gibson*, 22 S.W.3d 849, 852 (Tex. 2000). "By focusing on whether the plaintiff has a concrete injury, the ripeness doctrine allows courts to avoid premature adjudication, and serves the constitutional interests in

prohibiting advisory opinions." *Id.* If the Plaintiff cannot show that an injury has already come to pass, it must show that the injury is "imminent." *Save Our Springs Alliance v. City of Austin*, 149 S.W.3d 674, 683, 685 (Tex. App.—Austin 2004, pet. denied) (holding that the City's zoning rules affecting Plaintiffs were not ripe for review until a building permit that might actually cause the injury alleged was actually issued).

Plaintiffs' constitutional claims rely entirely upon events that have not yet come to pass. Plaintiffs' Petition states in vague terms that Plaintiffs "will be affected" at some point after October 1, 2018 when the Earned Sick Time Ordinance takes effect.[9] It does not, however, state that Plaintiffs have actually suffered any injury to date. Even where Plaintiffs reference the period of time before October 1, 2018 and the effective date of the Earned Sick Time Ordinance, they state only that they "are forced" to spend resources on compliance, but not that any single Plaintiff has in fact spent time, money, or effort toward this end.[10] To the extent Plaintiffs merely contend that their alleged injuries are "imminent," they fail to allege sufficient facts. Plaintiffs have not named any individual business that will suffer any particular injury, and without such allegations, their claims are merely speculative. As to the equal protection claim, Plaintiffs fail to allege that when or if they will actually be put at a disadvantage compared to any unionized employer—for this claim to be ripe, Plaintiffs would at least need to identify an employer subject to a collective bargaining agreement with its employees who would not already provide the minimum earned sick time required by the Ordinance; otherwise, Plaintiffs have not alleged any injury that is not hypothetical. Similarly, Plaintiffs' claim under the search and seizure provision of the Texas Constitution is contingent on being harmed by enforcement actions (via the City's subpoena power) that have never been used by the City and are not likely

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[9] *See Plaintiffs Original Petition* at ¶¶ 3–5.
[10] *See Plaintiffs Original Petition* at ¶ 11.

to be used against any complying business entity. Therefore, this claim also rests on entirely speculative or hypothetical harm to Plaintiffs. Because the injury to Plaintiffs under these claims is entirely hypothetical, Plaintiffs' bald assertion that such injury is "imminent" is without merit, and these claims lack ripeness necessary for the Court to exercise subject matter jurisdiction.

C. Austin's Earned Sick Time Ordinance is Not Unconstitutional

Though the State does not join these claims, the TAB Plaintiffs allege that the City's Earned Sick Time Ordinance is unconstitutional pursuant to the Texas Constitution Article I, § 19 ("due course of law"); Article I, § 3 ("equal protection"), and Article I, § 9 ("search and seizure"). When the constitutionality of an ordinance is challenged, the Court should begin with a presumption of validity, and the burden is on the party attacking the ordinance to establish its unconstitutionality. *Sax v. Votteler*, 648 S.W.2d 661, 664 (Tex. 1983), *Texas Pub. Bldg. Auth. v. Mattox*, 686 S.W.2d 924, 927 (Tex. 1985); *Robinson v. Hill*, 507 S.W.2d 521, 524 (Tex. 1974).

Plaintiffs bring this litigation well before the Earned Sick Time Ordinance has gone into effect and advance broad claims about its supposed unconstitutionality. While the TAB Plaintiffs try to characterize their due process and equal protection claims as "as-applied," this is not supported by their pleadings, which contain—at most—speculative and broad allegations of expected harm, which is insufficient to survive a motion to dismiss.[11] *See GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 754 (Tex. App.—Beaumont 2014, pet. denied) (Under Rule 91a, "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." (internal quotations omitted)). In other words, TAB Plaintiffs fail to properly "assert that the Act is unconstitutional 'as applied' because the Act has never been applied to anyone," and therefore, their claims should be considered facial challenges. *See Barshop v. Medina Cty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 626–27 (Tex.

[11] *See Plaintiffs Original Petition* at ¶¶ 36–42.

1996). "To sustain a facial challenge, the challenging party must establish that the statute, by its terms, always operates unconstitutionally," *id.*, without "go[ing] beyond the statute's facial requirements [to] speculate about 'hypothetical' or 'imaginary' cases." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449–50 (2008); *see also Geeslin v. State Farm Lloyds*, 255 S.W.3d 786, 794 (Tex. App.—Austin 2008, no pet.). As described for each claim below, the TAB Plaintiffs fail to allege sufficient facts that the Ordinance would *always* be unconstitutional, even if their claims had some basis under some specific, hypothetical set of facts. Regardless, as described below, even if the Court agreed that parts of the TAB Plaintiff's pre-enforcement action can be fairly characterized as "as-applied" challenges, the TAB Plaintiffs still fail to plausibly demonstrate that the Paid Sick Time Ordinance is unconstitutional as applied to them.

1. **The Earned Sick Time Ordinance does not violate Plaintiffs' Substantive Rights under the Texas Due Course of Law Clause.**

Plaintiffs allege that the Ordinance violates their economic due process rights under Article I, § 19 of the Texas Constitution, which states that "no citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disenfranchised, except by the due course of law or the land." Tex. Const. art. I, § 19.[12]

As noted above, despite the TAB Plaintiffs' bare-boned allegations that their due process claims are an "as-applied" challenge, their lack of pleading of actual harm and the fact that their claims are brought before the Ordinance has gone into effect requires the Court to construe their claims as a facial challenge. As a facial challenge, the TAB Plaintiffs' claims fail because they cannot establish that the Earned Sick Time Ordinance "always operates unconstitutionally" in violation of Texas Constitution. *See Geeslin v. State Farm Lloyds*, 255 S.W.3d 786, 794 (Tex.

[12] *See Plaintiffs Original Petition* at ¶¶ 50–56.

App.—Austin 2008, no pet.) ("To sustain a facial challenge, [a] party must show that the statute, by its terms, *always* operates unconstitutionally.") (emphasis added)). Indeed, large numbers of Austin employers already offer earned sick time, including Intervenor-Defendants Workers Defense Project and L'Oca d'Oro LLC. These employers will be unaffected by the Ordinance, and therefore Plaintiffs have no basis for arguing that the Ordinance is "overly burdensome" as discussed in detail below. Because the Ordinance would clearly not be unconstitutional as applied to them, it cannot be unconstitutional on its face.

Even if the Court agrees that the TAB Plaintiffs' claim can be considered an as-applied challenge, the allegations in their pleadings do not come close to meeting the high bar set by the Texas Supreme Court in its seminal case on this point, *Patel v. Texas Department of Licensing and Regulation*, 469 S.W.3d 69 (Tex. 2015). In that case, a group of commercial eyebrow threaders and their employers brought suit against the Texas Department of Licensing and Regulation, alleging that the licensing requirements as applied to them violated their right to substantive due course of law. *Id.* at 88. Plaintiffs there pointed specifically to a 750-hour course required for an esthetician's license, which was the shorter of two licensing options a person had to obtain in order to practice as a threader. *Id.* at 73.

The Court stated that the standard of review for determining the constitutionality of an economic regulation as-applied was "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 87. The Court emphasized that as a rule, there is a presumption that a statute is constitutional. To overcome that presumption of validity, a challenger must show that "either (1) the statute's purpose could not arguably be rationally related to a legitimate governmental interest; or (2) when considered as a whole, the statute's actual, real-world effect as applied to the challenging

party could not arguably be rationally related to, or is so burdensome as to be oppressive in light of, the governmental interest." *Id.* at 87. According to the *Patel* Court, this "places a high burden on parties claiming a statute is unconstitutional" and the case-law establishes this.

Plaintiffs do not rest their argument on the first prong of the *Patel* test—nor could they. The Earned Sick Time Ordinance is, on its face, "rationally related" to a legitimate governmental interest under the applicable case law. Courts have found a wide variety of governmental action to meet this standard, finding that denying a landowner's development application was related to the governmental interest in preventing negative urbanization effects, *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 938 (Tex. 1998); that using even an imperfect disability rating system to award workers' compensation benefits was a "rational and reasonable" replacement for a prior compensation system, *Tex. Workers' Cop. Comm'n v. Garcia*, 893 S.W.2d 504, 525 (Tex. 1995); and that retaining a ten-year statute of repose on certain construction claims would "strike a fair balance" between the interests in protecting potential defendants from having to litigate old claims and in allowing potential plaintiffs to seek recourse for injury through the legal system, *Trinity River Auth. v. URS Consultants, Inc.*, 889 S.W. 2d 259, 264 (Tex. 1994).

Importantly, Texas courts have specifically upheld statutes that seek to address concerns regarding health and safety. For example, in *Texas State Board of Barber Examiners v. Beaumont Barber College, Inc.*, the Court has upheld a statute mandating new and rigorous requirements for barber colleges. 454 S.W.2d 729, 732–33 (Tex. 1970). The Court noted particularly that even requirements that the college have certain departments, that it separate those departments in a certain physical layout, and that the college maintain a minimum number of chairs and amount of floor space, were all reasonably related to the interest in maintaining sanitation in the college. *Id.*

Even when the Court could not determine which legitimate governmental interest was intended, it was still able to determine that each interest apparently at issue was rationally related to a legitimate governmental interest. *See Hous. & Tex. Cent. Ry. Co. v. City of Dallas*, 84 S.W. 648, 653 (Tex. 1905) (noting that whether the ordinance at issue, which required railroads to level the grading at street crossings, was intended more for ensuring safe crossings, or more for providing convenient walkways for pedestrians, both were ultimately rationally related to legitimate governmental interests).

The Earned Sick Time Ordinance also meets the second prong of the Court's test in *Patel*. Assuming all of the facts pleaded by TAB Plaintiffs are true, there is no plausible basis for finding that the Ordinance is oppressively burdensome as compared to the governmental interests in health, safety, and economic stability that were specifically identified by the Austin City Council in the text of the Ordinance. In *Patel*, the Court looked specifically at three key aspects of the 750-hour course requirement that could pose a potential burden on the threaders: (1) the number of hours the course took to complete; (2) the amount of money the course cost; and (3) the ratio between the number of hours the course taught on issues related to health, safety, or sanitation compared to the number of hours the course provided on issues not relevant to these or other issues threaders needed to practice their trade. *Patel*, 469 S.W.3d at 89. Pursuant to the Court's rule, it then balanced these facts against the public interests involved, which the Court found were important, even if out of proportion to the burden placed on the threaders. *Id.*

Here, by contrast, Plaintiffs' pleadings contain no factual allegations that, even if assumed to be true, could reasonably be considered over-burdensome in light of the interests at stake. For example, Plaintiffs contend that the burden placed on them would be (1) an increase

in labor costs, which they admit would be less than 4% if every single hour of earned sick time were used by every single employee, and (2) increased costs to record where employees are working (whether time is within the City or not).[13] The TAB Plaintiffs' allegations, taken as true, are vague, speculative, fail to identify any plausible harm that they imminently face, and to the extent the TAB Plaintiffs generally allege any burden placed on them is an *unreasonable* burden, those conclusory allegations cannot be reasonably believed.[14]

Indeed, compared to the licensing requirements in *Patel*, there are no specific allegations that the Earned Sick Time Ordinance would place anything more than a minimal burden on the TAB Plaintiffs. First, while the threaders in *Patel* had to complete 750 hours of coursework before they could practice threading (a practice that could be learned in a matter of a day), Plaintiffs fail to make any specific allegations about the time it would take to implement a compliance system.

Similarly, while the threaders in *Patel* had to pay at least $3,500 per threader for the required esthetician's course, businesses in Austin will pay additional wages of at most just 1 extra hour of work for every 30 hours of work each employee performs, capped at a total of 64 hours of accumulation. For large businesses employing 15 full-time employees earning minimum wage, the Earned Sick Time Ordinance would result in a total additional labor expense of less than $7,000 dollars pay per year to cover its entire payroll. That cost is miniscule compared to the overall cost of labor for those 15 employees, which would already be over $250,000 per year before the Ordinance. In this example, the employer would be burdened by an additional 3%

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[13] These facts are apparent and obvious on the face of the Ordinance, but are also fairly inferred in Plaintiffs' Petition. *See Plaintiffs Original Petition* at ¶ 38 (alleging Earned Sick Time Ordinance could require an employer to pay the equivalent of 40 hours' pay for 32 hours worked in a week, but omitting the cap applied in the Ordinance that would mandate this be allowable for only up to 8 days/year); *Plaintiffs Original Petition* at ¶ 36, 37, 41 (alleging supposed administrative costs necessary for compliance).

[14] *See Plaintiffs Original Petition* at ¶¶ 36–42.

expense in labor costs—hardly could this be considered "so unreasonably burdensome that it [is] oppressive."

Moreover, the burden imposed must be considered in light of the important goals of promoting health and safety in workplaces, and in protecting the economic stability of the City—interests that were carefully articulated by the City in passing the Ordinance. *See* Austin City Code, Ordinance No. 20180215-049, Part 1(B).

Plaintiffs' claims, assuming the truth of all factual allegations therein, fail to satisfy either element of the constitutional analysis laid out in *Patel*.[15] Even taking all of Plaintiffs' allegations as true, Plaintiffs have not shown that they are entitled to relief, and no reasonable person could believe their conclusory allegations that an unreasonable burden is placed on them by the Ordinance. Accordingly, this claim has no basis in law or fact and should be dismissed. TEX. R. CIV. P. 91a.1.

2. The Earned Sick Time Ordinance does not violate Plaintiffs' substantive rights under the Texas Equal Protection Clause.

Plaintiffs next allege that the Ordinance violates their equal protection rights protected by Texas Constitution Article I, § 3 because it allows unionized employers operating with a collective bargaining agreement to "modify the yearly cap" of paid sick leave "while denying this right to non-unionized employers."[16] First, despite Plaintiffs' allegation of an as-applied challenge, this claim should be characterized as a facial challenge which, on its face, must fail.

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[15] While the Court in *Patel* recognized out that the issue of whether a regulation is overly burdensome may involve considering "evidence offered by the parties" at the summary judgment stage, the Court need not consider any evidence at the dismissal stage if it accepts all of Plaintiffs' reasonably believable allegations as true. As described in the sections above, the purpose of Rule 91a is to allow the Court to determine the plausibility of claims based solely on the pleadings, and the Rule allows the Court to dismiss such claims when Plaintiffs do not allege facts that, even if uncontested and proven by their own evidence, would entitle them to relief. Accordingly, if the Court determines as a matter of law—which it must—that even if Plaintiffs' allegations of burden were true, that such burden would not rise to the level of undue burden contemplated in *Patel*, then the Court must dismiss Plaintiffs' claim.

[16] *See Plaintiffs Original Petition* at ¶¶ 57–61.

As noted above, "[t]o sustain a facial challenge, [a] party must show that the statute, by its terms, *always* operates unconstitutionally." *Geeslin v. State Farm Lloyds*, 255 S.W.3d 786, 794 (Tex. App.—Austin 2008, no pet.) (emphasis added). As a facial challenge, which requires that the Ordinance must *always* operate in violation of the Constitution, this claim fails because the Ordinance does not impose any restriction on which employers may take advantage of the ability to modify the sick-time cap, but rather, merely imposes rules on entities who have made their own decisions on whether or not to engage in collective bargaining. Moreover, just as described below, Plaintiffs fail to allege any harm that is not entirely hypothetical, as the Court can easily imagine a case where every single unionized employer who could take advantage of the sick-time cap is contractually required by their respective collective bargaining agreement to offer more sick-time than the Ordinance requires. Under this set of facts, the Ordinance would pass Plaintiffs' facial challenge because no employer would actually provide less sick time than the Ordinance requires.

However, even if the Court were inclined to consider this claim as-applied to the TAB Plaintiffs, it must reject their erroneous description of the applicable standard. The TAB Plaintiffs contend that strict scrutiny applies to this claim, and therefore, based on that test, there is no rational basis related to a compelling governmental interest that exists to justify the distinction. These are not the appropriate standards for reviewing Plaintiffs' equal protection claim.

"To state a viable equal-protection claim under the Texas Constitution, the Petitioners must show they have been 'treated differently from others similarly situated.'" *Klumb v. Houston Municipal Employees Pension System*, 458 S.W.3d 1, 13 (Tex. 2015) (quoting *Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 647 (Tex. 2004). When, as here,

"neither a suspect classification nor a fundamental right is involved, the Petitioners must further demonstrate that the challenged decision is not rationally related to a legitimate governmental purpose." *Id.* (citing *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 639 (Tex. 2008)). "In conducting a rational-basis review, [the court should] consider whether the challenged action has a rational basis and whether use of the challenged classification would reasonably promote that purpose." *Id.*

But the TAB Plaintiffs fail to allege facts demonstrating that they are treated differently under the Ordinance. Plaintiffs do not allege the existence of any unionized employer that provides less paid sick leave or paid time off than is required by the Ordinance, nor do they allege that any unionized employer has a competitive advantage due to the Ordinance going into effect. And that omission is not surprising—employers are free to encourage employees to be members of a union and to enter into collective bargaining with their unionized employees if they feel this will provide them an advantage in complying with the Earned Sick Time Ordinance. Moreover, failure to plead these facts requires the Court to dismiss this claim because Plaintiffs fail to show that the Ordinance actually treats them differently.

Third, even assuming that Plaintiffs had alleged facts sufficient to show that they are treated differently by the Ordinance, 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. The City has a legitimate interest in permitting employees to negotiate for better benefits and giving workers the ability to modify this cap may be necessary for unionized workers to have leverage in negotiations. Permitting open union negotiations prevents economic disruption resulting from labor disputes that could adversely affect this City's economy. Accordingly, the distinction exists so that this floor of

fringe benefits may be horse-traded for other, better benefits suited to workers that have real negotiation power, thereby protecting the City's economic stability, and empowering its workers. *See generally Houchens Market of Elizabethtown, Inc. v. N.L.R.B., 375 F.2d 208, 212* (4th Cir. 1967) ("The purpose of collective bargaining is to fix wages, hours and conditions of work by a trade agreement between the employer and his employees."); *In re Braniff Airways, Inc.*, 25 B.R. 216, 218 (W.D. Tex. Bankr. 1983) ("[T]he purpose of collective bargaining is to avoid disruption of commerce and resolve differences which threaten the continuity of work."); *YHA, Inc. v. N.L.R.B.*, 2 F.3d 168, 175 (6th Cir. 1993) (Guy, J. dissenting) ("One of the purposes of collective bargaining is to define the rules of the workplace through a process of give and take."). The Court may use its own judgment as to these legitimate interests, and no evidence need be presented to establish the rational basis explained above. *See Klumb v. Houston Municipal Employees Pension System*, 458 S.W.3d 1, 13 (Tex. 2015) (quoting *FCC v. Beach Commc'ns*, Inc., 508 U.S. 307, 315 (1993)) (noting that the Court's determination of these issues as a matter of law "'may be based on rational speculation unsupported by evidence or empirical data.'").

For these reasons, the Court should find that the equal protection claim has no basis in law or fact and that it should be dismissed pursuant to Rule 91a.

3. The Earned Sick Time Ordinance is not Unconstitutional on its Face pursuant to Texas's Protection against Unreasonable Search and Seizure.

Finally, Plaintiffs allege that the investigatory subpoena power granted by the City's Earned Sick Time Ordinance makes the Ordinance unconstitutional on its face pursuant to Article I, § 9 of the Texas Constitution, which provides that "The people shall be secure . . . from all unreasonable seizures or searches . . . ." Tex. Const. art I, § 9.

Plaintiffs claim has no basis in law or fact for several reasons. First, as noted above, "[t]o sustain a facial challenge, [a] party must show that the statute, by its terms, *always* operates

unconstitutionally." *Geeslin v. State Farm Lloyds*, 255 S.W.3d 786, 794 (Tex. App.—Austin 2008, no pet.) (emphasis added). Even assuming, *arguendo*, that Plaintiffs could show that a *particular* application of the subpoena power could violate the search and seizure protection afforded by the Texas Constitution, Plaintiffs fail to allege any facts that demonstrate the Ordinance would *always* operate in this way. The Court could imagine any number of applications of this provision that comply with the Constitution, for example, if only publicly available materials were subpoenaed—in such a case, the party being investigated would have no privacy expectation in the materials requested, and no Constitutional violation would be possible.

Second, even assuming a facial challenge was feasible in this case, courts have flatly rejected this type of claim based on both the Texas Constitution and its 4th Amendment counterpart in the U.S. Constitution. *See Schade v. Texas Workers' Compensation Com'n*, 150 S.W.3d 542, 550 (Tex. App.—Austin 2004, pet. denied) (citing *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 189 (1946)). In the context of an administrative subpoena for investigatory purposes,

> the Fourth Amendment and its Texas counterpart at most guard against abuse only by way of too much indefiniteness or breadth in the things required to be "particularly described," if the agency request for the production of corporate records and papers is one the requesting agency is authorized to make and the materials specified are relevant. The overriding standard is the disclosure sought shall not be unreasonable. It is not necessary, as in the case of a warrant, that a specific charge or complaint of violation of law be pending or that the order be made pursuant to one. It is enough that the investigation be for a lawfully authorized purpose, within the power of the legislature to command. See id.

Id. (internal citations omitted). Accordingly, the City has broad authority to subpoena materials to ensure compliance with the Ordinance.

Third, Plaintiffs' claim that the failure of the Ordinance to outline pre-compliance challenge procedures for such subpoenas renders it unconstitutional is baseless and premised on

an incorrect assumption. Pre-compliance challenge would be available by simply seeking a motion for protective order or to quash in the municipal or state district court. Plaintiffs' pleaded facts that such remedy is not available is simply false, and no reasonable person could believe this to be true. *See* TEX. R. CIV. P. 91a.1 ("A cause of action has no basis in fact if no reasonable person could believe the facts pleaded.").

For all of these reasons, this claim fails to allege a claim for which relief can be granted and has no basis in law or fact. Accordingly, it must be dismissed pursuant to Rule 91a.

D. Plaintiffs are Not Entitled to a Temporary or Permanent Injunction

Finally, Plaintiffs seek temporary and permanent injunctions preventing the Earned Sick Time Ordinance from going into effect.[17] Because all of Plaintiffs' claims fail as a matter of law, Plaintiffs cannot show a plausible right to relief and their applications for injunction should be denied. *See Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 210 (Tex. 2002). Accordingly, Plaintiffs' application for injunction should be denied.

IV.
ATTORNEY'S FEES

To the extent permitted by law, Intervenor Defendants should be awarded their Attorney's Fees for pursing this Motion pursuant to Texas Rule of Civil Procedure 91a.

V.
HEARING

This Motion to Dismiss will be set for a hearing after conferring with opposing counsel, but not sooner than 21 days after its filing in accordance with Texas Rule of Civil Procedure Rule 91a. Pursuant to Rule 91a, the Court must rule on this Motion within 45 days of its filing, whether or not the case has been set for hearing. *See* Tex. R. Civ. P. 91a.3(c) (45-day

[17] *See Plaintiffs Original Petition* at ¶ 68.

requirement); 91a.6 ("The court may, but is not required to, conduct an oral hearing on the motion.").

VI.
PRAYER

WHEREFORE, PREMISES CONSIDERED, Intervenor Defendants respectfully request that all of Plaintiffs' and Intervenor Plaintiff's claims be dismissed with prejudice pursuant to Texas Rule of Civil Procedure 91a, and such other relief in law or equity as Intervenors may show themselves entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of May, 2018 a true and correct copy of the foregoing *Motion to Dismiss* was served upon Defendants via email to Meghan Riley, attorney for Defendants, via email at meghan.riley@austintexas.gov and upon all counsel of record in accordance with TEX. R. CIV. P. 21(a).

/s/ _____

Mimi Marziani