

CAUSE NO. 2019CI13921

ASSOCIATED BUILDERS & CONTRACTORS OF	§	IN THE DISTRICT COURT
SOUTH TEXAS, INC., AMERICAN STAFFING	§	
ASSOCIATION, BBM-ONLINE, LLC D/B/A/ BBM	§	
STAFFING, THE BURNETT COMPANIES	§	
CONSOLIDATED, INC. D/B/A/ BURNETT	§	
SPECIALISTS, CARDINAL SENIOR CARE, LLC	§	
D/B/A/ CARDINAL MED STAFFING, CHOICE	§	
STAFFING, LLC, EEMPLOYERS SOLUTIONS, INC.,	§	
HAWKINS ASSOCIATES, INC. D/B/A/ HAWKINS	§	
PERSONNEL GROUP, LEADINGEDGE PERSONNEL,	§	
LTD., STAFF FORCE, INC. D/B/A/ STAFF-FORCE	§	
PERSONNEL SERVICES, SAN ANTONIO	§	
MANUFACTURERS ASSOCIATION, SAN ANTONIO	§	
RESTAURANT ASSOCIATION,	§	
<i>Plaintiffs,</i>	§	
	§	
and	§	
	§	
TEXAS,	§	408TH JUDICIAL DISTRICT
<i>Intervenor-Plaintiff</i>	§	
	§	
v.	§	
	§	
CITY OF SAN ANTONIO, RON NIRENBERG, MAYOR	§	
OF THE CITY OF SAN ANTONIO, ERIK WALSH,	§	
CITY MANAGER OF THE CITY OF SAN ANTONIO,	§	
AND COLLEEN BRIDGER, DIRECTOR OF THE SAN	§	
ANTONIO METROPOLITAN HEALTH DISTRICT,	§	
<i>Defendants,</i>	§	
	§	
and	§	
	§	
MARILYN WASHINGTON, MOVE TEXAS ACTION	§	
FUND, AND TEXAS ORGANIZING PROJECT	§	
EDUCATION FUND,	§	
<i>Intervenor-Defendants.</i>	§	BEXAR COUNTY, TEXAS

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TEXAS'S ORIGINAL PETITION IN INTERVENTION

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TO THE HONORABLE COURT:

The City of San Antonio sick leave ordinance at issue in this cause regulates private employee wages in a manner that is preempted by Texas law and is therefore unconstitutional. Through its attorney general, Texas intervenes under Rule of Civil Procedure 60 and Civil Practice and Remedies Code § 37.006 to protect and defend the laws of this State, and to prevent irreparable harm to its sovereignty.

### **BACKGROUND**

1. On August 16, 2018, the City of San Antonio adopted Ordinance No. 2018-08-16-0620 (“Paid Sick Leave Ordinance” or “Ordinance”), which requires private employers to provide paid sick leave to their employees. A true and correct copy of the Paid Sick Leave Ordinance is attached hereto as Exhibit 1.

2. The City enacted the Paid Sick Leave Ordinance because it believes “denying earned paid sick time to employees is detrimental to the health, safety, and welfare of the residents of the City of San Antonio” and “contributes to employee turnover and unemployment, and harms the local economy.” Ex. 1 at 1.

3. The Paid Sick Leave Ordinance requires an employer to provide an employee “one hour of earned paid sick time for every thirty (30) hours worked for the employer in the City of San Antonio.” Ordinance § 2 at § 15-272(b); Ex. 1 at 3. This leave must begin to accrue in one-hour (or smaller) increments upon commencement of employment. Ordinance § 2 at § 15-272(b)(1)-(2); Ex. 1 at 3-4.

4. The Paid Sick Leave Ordinance applies to myriad employers, including individual persons, companies, corporations, firms, partnerships, unions, and non-profit organizations and associations. Ordinance § 2 at § 15-269; Ex. 1 at 2.

5. The Paid Sick Leave Ordinance covers an “an individual who performs at least eighty (80) hours of work for pay within the City of San Antonio, Texas in a year for an employer,” except independent contractors and unpaid interns. Ordinance § 2 at § 15-269; Ex. 1 at 2.

6. An employer with more than 15 employees (excluding family members) is permitted to cap the paid sick leave each employee may accrue at 64 hours per year. Ordinance § 2 at §§ 15-269, 15-272(b)(3)(A); Ex. 1 at 2, 4. An employer with fewer than 15 employees (excluding family members) is permitted to cap the paid sick leave each employee may accrue at 48 hours per year. Ordinance § 2 at §§ 15-269, 15-272(b)(3)(B); Ex. 1 at 3, 4. Paid sick leave carries over from one year to the next. Ordinance § 2 at § 15-272(b)(4); Ex. 1 at 4.

7. An employer may not require an employee to find a replacement to work while the employee takes paid sick leave. Ordinance § 2 at § 15-272(d); Ex. 1 at 5-6.

8. An employer must pay an employee who takes sick leave the same amount the employee would have been paid had they worked during that time, but “no less than the state minimum wage.” Ordinance § 2 at § 15-272(a); Ex. 1 at 3.

9. At least once per month an employer must provide each employee a statement showing the amount of the employee’s paid sick leave available for use. Ordinance § 2 at § 15-274(a); Ex. 1 at 6.

10. Defendant City of San Antonio is a home rule municipality subject to the laws of the State of Texas. The City enacted the Paid Sick Leave Ordinance.

11. Defendant Nirenberg is Mayor of the City of San Antonio and has authority to exercise control over the City, City officials, and the City's implementation of the Ordinance.

12. Defendant Walsh is City Manager of the City of San Antonio. Walsh is responsible for the day to day operations of the City of San Antonio and is charged with implementing portions of the Ordinance. *See, e.g.*, Pls.' Orig. Pet. ¶ 15; Ordinance §§ 3, 5; Ex. 1 at 8, 9.

13. Defendant Bridger is Director of the San Antonio Metropolitan Health District and is charged with implementing portions of the Ordinance. *See, e.g.*, Pls.' Orig. Pet. ¶ 16; Ordinance § 2 at §§ 15-279, 15-271, 15-274(d), § 3; Ex. 1 at 2, 3, 7.

14. By mandating that private employers give their employees paid sick leave, the Ordinance establishes a wage and calls upon Defendants to administer and enforce it. The Texas Minimum Wage Act preempts the City's Ordinance, rendering the Ordinance unconstitutional. *See, e.g., Texas Ass'n of Bus. v. City of Austin, Texas*, 565 S.W.3d 425, 440 (Tex. App.—Austin 2018, pet. filed); TEX. CONST. art. XI, § 5. Texas intervenes to protect the laws of the State, defend the public's interest in enforcement of legislation duly enacted by their elected representatives, and prevent irreparable harm to its sovereignty. *See also, e.g.*, CIV. PRAC. & REM. CODE § 37.006(b).

## STANDARD FOR INTERVENTION

15. There is no pre-judgment deadline for intervention. *Texas Mut. Ins. Co. v. Ledbetter*, 251 S.W.3d 31, 36 (Tex. 2008) (citing TEX. R. CIV. P. 60; *Citizens State Bank of Sealy v. Caney Invs.*, 746 S.W.2d 477, 478 (Tex. 1988)). Texas courts recognize an “expansive” intervention doctrine in which a plea in intervention may be untimely only if it is “filed after judgment,” *Texas v. Naylor*, 466 S.W.3d 783, 788 (Tex. 2015) (quoting *First Alief Bank v. White*, 682 S.W.2d 251, 252 (Tex. 1984)), though even post-judgment interventions are permissible in some circumstances. *Ledbetter*, 251 S.W.3d at 36 (citing *In re Lumbermens Mut. Cas. Co.*, 184 S.W.3d 718, 725–26 (Tex. 2006)). There is no final judgment in this case. Texas’s intervention is timely.

16. “Any party may intervene [in a case] by filing a pleading, subject to being stricken out by the court for sufficient cause on the motion of any party.” TEX. R. CIV. P. 60. An intervenor is not required to secure a court’s permission to intervene in a cause of action or establish standing. *Guar. Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 657 (Tex. 1990). An intervenor need only show a “justiciable interest in a pending suit to intervene in the suit as a matter of right.” *In re Union Carbide Corp.*, 273 S.W.3d 152, 154 (Tex. 2008). “A party has a justiciable interest in a lawsuit, and thus a right to intervene, when his interests will be affected by the litigation.” *Jabri v. Alsayyed*, 145 S.W.3d 660, 672 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (citing *Law Offices of Windle Turley v. Ghiasinejad*, 109 S.W.3d 68, 71 (Tex. App.—Fort Worth 2003, no pet.)). “The interest asserted by the intervenor may be legal or equitable.” *Guar. Fed. Sav. Bank*, 793 S.W.2d at 657 (citation omitted).

## TEXAS'S INTERESTS

17. Texas—through its attorney general—has an interest in this case under the Uniform Declaratory Judgment Act. That Act provides that in any proceeding where a municipal ordinance is alleged to be unconstitutional, “the attorney general of the state must also be served . . . and is entitled to be heard.” TEX. CIV. PRAC. & REM. CODE § 37.006(b). Texas “courts have consistently understood the State’s ‘entitle[ment] to be heard’” under § 37.006(b) “to mean the right to intervene in the litigation as a party.” *Texas Ass’n of Bus. v. City of Austin*, 565 S.W.3d at 433-34 (citing *Texas Dep’t of Trans. v. Sefzik*, 355 S.W.3d 618, 622 (Tex. 2011) (per curiam); *City of Austin v. Travis Cent. Appraisal Dist.*, 506 S.W.3d 607, 612 n.3 (Tex. App.—Austin 2016, no pet.); *Texas Bd. of Chiropractic Exam’rs v. Texas Med. Ass’n*, 375 S.W.3d 464, 473 (Tex. App.—Austin 2012, pet. denied)).

18. Plaintiffs seek (among other relief) a declaration that the Ordinance is unconstitutional, preempted by the Texas Minimum Wage Act, and unenforceable. *E.g.*, Pls.’ Orig. Pet. ¶¶ 18-19, 39-41, Prayer. Thus, Texas—by and through the Attorney General as an intervenor—has a right to “be heard” in this Court. TEX. CIV. PRAC. & REM. CODE § 37.006(b); *see also Texas Ass’n of Bus.*, 565 S.W.3d at 33-34 (holding that Texas, through its Attorney General, had standing to intervene in action seeking a declaration that a City of Austin paid sick leave ordinance was preempted by State law and unconstitutional).

19. Texas has an interest in this case because of its unquestionable stake in the enforcement of its duly enacted laws, which preempt the Ordinance. *See, e.g.*,

*Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013) (recognizing that, when a duly enacted law cannot be enforced, “the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws”).

20. Chapter 62 of the Labor Code, the Texas Minimum Wage Act (“TMWA”), establishes and regulates wages in the State. TEX. LAB. CODE § 62.001–.205.

21. The TMWA expressly preempts local municipalities from enacting ordinances establishing or otherwise governing the wage paid by private employers.

22. With a few exceptions not relevant here, the TMWA provides that employers “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. LAB. CODE § 62.051. The Act states “the minimum wage provided by this chapter supersedes a wage established in an ordinance, order, or charter provision governing wages in private employment, other than wages under a public contract.” *Id.* § 62.0515(a).

23. The TMWA also states “[t]his chapter and a municipal ordinance or charter provision governing wages in private employment, other than wages under a public contract, do not apply to a person covered by the Fair Labor Standards Act of 1938 (29 U.S.C. [§] 201 *et seq.*)” *Id.* § 62.151.

24. The Fair Labor Standards Act (“FLSA”) sets a minimum wage based on employee hours worked in a workweek. 29 U.S.C. § 206.

25. The TMWA does not require private employers to provide any minimum amount of paid sick leave to their employees.

26. The State of Texas—through its Legislature—has chosen a policy of uniform wage regulation.

27. Texas has an interest in this case because its sovereignty would be irreparably harmed and its Constitutional design upended if the ordinance—which Texas law preempts—is allowed to take effect. *See, e.g., Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018) (“the inability to enforce its duly enacted [laws] clearly inflicts irreparable harm on the State”) (citing *Maryland v. King*, 567 U. S. 1301 (2012) (Roberts, C. J., in chambers)).

#### COUNT ONE: PREEMPTION

28. Texas repeats and incorporates by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

29. A Texas home rule municipality may not enact an ordinance “inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of the State.” TEX. CONST. art. XI, § 5.

30. “While home-rule cities have all power not denied by the Constitution or state law, and thus need not look to the Legislature for grants of authority, the Legislature can limit or withdraw that power by general law.” *City of Laredo v. Laredo Merch. Ass’n*, 550 S.W.3d 586, 592 (Tex. 2018) (citation omitted).

31. “An ordinance of a home-rule city that attempts to regulate a subject matter preempted by a state statute is unenforceable to the extent it conflicts with the state statute.” *Dallas Merch.’s & Concessionaire’s Ass’n v. City of Dall.*, 852 S.W.2d 489, 491 (Tex. 1993) (citation omitted).



32. When the State “adopts a general law and applies it to all cities of a certain class, no city of such class is authorized to enact contrary legislation.” *City of Beaumont v. Gulf States Util. Co.*, 163 S.W.2d 426 (Tex. Ct. App.—Beaumont 1942). Cities may not “enter[ ] a field of legislation which has been occupied by general legislative enactments.” *City of Baytown v. Angel*, 469 S.W.2d 923 (Tex. Ct. App.—Houston [14th Dist.] 1971). Local regulation must be “in harmony” with “the general scope and purpose of [ ] state enactment[s].” *BCCA Appeal Grp., Inc. v. City of Hous.*, 496 S.W.3d 1, 7 (Tex. 2016).

33. The TMWA provides that employers in Texas will pay employees a minimum wage established by FLSA.

34. The TMWA supersedes a wage established by a municipal ordinance like the Paid Sick Leave Ordinance.

35. The TMWA prohibits the Paid Sick Leave Ordinance from applying to a person covered by FLSA.

36. FLSA requires employers only to pay wages for hours actually worked.

37. FLSA requires that the pay for employees be evaluated, for minimum wage purposes, based on the work week, not by the hour or day.

38. The Paid Sick Leave Ordinance violates the TMWA and FLSA by requiring employers to pay employees for hours not worked, thereby increasing wages for the work week beyond those required by the TMWA and FLSA.

39. The TMWA preempts the City of San Antonio Paid Sick Leave Ordinance, rendering it unconstitutional. *See, e.g.*, TEX. CONST. art. XI, § 5; *Texas Ass'n. of Bus.*, 565 S.W.3d at 440.

#### REQUEST FOR DISCLOSURE

40. Texas requests that Defendants disclose the information and materials described in Texas Rule of Civil Procedure 194.2.

#### PRAYER

WHEREFORE, PREMISES CONSIDERED, Texas respectfully prays that the Court:

- A. Through counsel below, enter an appearance for Texas in this cause;
- B. Declare, under Civil Practices and Remedies Code Chapter 37, that City of San Antonio Ordinance No. 2018-08-16-0620 is preempted and unconstitutional;
- C. Permanently enjoin, under Chapters 37 and 65 of the Civil Practices and Remedies Code, Defendants from enforcing City of San Antonio Ordinance No. 2018-08-16-0620; and
- D. Award any further relief that the Court may deem proper in law or equity.<sup>1</sup>

Respectfully submitted this 19th day of July, 2019.

KEN PAXTON  
Attorney General of Texas

JEFFREY C. MATEER  
First Assistant Attorney General

RYAN L. BANGERT  
Deputy Attorney General for Legal Counsel

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<sup>1</sup> *See, e.g., Yett v. Cook*, 281 S.W. 837, 843 (Tex. 1926) (“[U]nder the common law, by which our Constitution and statutes are to be interpreted, the state could forfeit municipal charters for misconduct of their officers.”).

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 19, 2019, the foregoing instrument was served electronically upon all counsel of record through the electronic filing manager in accordance with Texas Rule of Civil Procedure 21a. Service was also made upon Defendants by facsimile to the City Clerk at 210-207-7032, in accordance with Texas Rule of Civil Procedure 21a, Texas Civil Practice & Remedies Code § 17.024(b); and the Charter of the City of San Antonio, Art. 2, § 10.

/s/ Anne Marie Mackin  
ANNE MARIE MACKIN  
Assistant Attorney General