

NO. 03-18-00445-CV

IN THE THIRD COURT OF APPEALS
AUSTIN, TEXAS

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

Plaintiffs-Appellants

&

STATE OF TEXAS

Intervenor-Appellants

v.

CITY OF AUSTIN, TEXAS, et al.

Appellees

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

ABC OF TEXAS, INC., ASSOCIATED GENERAL CONTRACTORS-TEXAS
BUILDING BRANCH, AND TEXAS CONSTRUCTION ASSOCIATION
BRIEF FOR *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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INTEREST OF AMICI

Associated Builders and Contractors of Texas, Inc. (“ABC”) is part of a national construction industry trade association representing more than 21,000 members. ABC helps its members deliver work safely, ethically, and profitably for the betterment of the communities in which they work. ABC has eight local chapters in the State of Texas, including a chapter in Austin, and counts more than 1,800 Texas employers—many of whom are already attempting a workable implementation of Austin’s Paid Sick Ordinance—as members.

The Associated General Contractors-Texas Building Branch (“AGC-TBB”) is a branch of AGC of America, a national construction industry trade association. AGC-TBB encompasses ten AGC chapters located throughout Texas whose members perform commercial building construction. The membership of these ten Texas AGC building chapters consists of approximately 370 general contractors and 3,890 specialty contractors, subcontractors, and suppliers—all doing business in Texas.

The Texas Construction Association (“TCA”) has approximately 3,000 company members, counting its direct members and the members of its state and local construction trade member associations. Every

construction trade is represented in the TCA membership, whose company members are located in all regions of Texas. TCA is dedicated to maintaining a vibrant and prosperous business climate, especially for subcontractors and suppliers in the construction industry.

ABC, AGC-TBB, and TCA are the sources of any fee paid or expected to be paid to counsel involved in preparing this brief. None of these associations have a direct financial interest in the outcome of this specific case.

In support of Appellants, the amici briefly examine the Texas Minimum Wage Act as it relates to the Ordinance, the Minimum Wage Act's legislative history, and the Ordinance's impending consequences on the respective memberships of ABC, AGC-TBB, and TCA.

SUMMARY OF ARGUMENT

The trial court's denial of Appellants' application to temporarily enjoin Austin's Paid Sick Leave Ordinance (the "Ordinance") was an abuse of discretion and should be reversed. The Ordinance, which raises the minimum compensation due to an employee for hours worked in Austin, should be restrained because it is inconsistent with the Texas Minimum Wage Act as amended (the "Minimum Wage Act"), which bars local minimum wage requirements inconsistent with the Minimum Wage Act.

ARGUMENT AND AUTHORITIES

Though “local regulation, ancillary to and in harmony with the general scope and purpose of [a] state enactment, is acceptable,” a “home-rule city’s ordinance is unenforceable to the extent that it is inconsistent with the state statute preempting that particular subject matter.” *BCCA Appeal Grp., Inc. v. City of Houston*, 496 S.W.3d 1, 7 (Tex. 2016).

A. The Ordinance Is Inconsistent with the Minimum Wage Act.

The Minimum Wage Act provides that employers throughout Texas “shall pay to each employee the federal minimum wage” in accordance with the federal Fair Labor Standards Act, which currently requires that “every employer pay to each of his employees . . . \$7.25 an hour” for every hour worked. Texas Labor Code § 62.051; 29 U.S.C. § 206(a).

The Ordinance, which requires that employers provide paid leave to employees working in Austin, is inconsistent with the Minimum Wage Act because it effectively raises the minimum wage required for an hour worked in Austin. The Ordinance mandates that every employer pay to eligible employees additional compensation—an additional one hour’s worth of pay (no less than \$7.25 per hour) for every thirty hours worked in Austin, payable at the time the thirtieth hour is worked and paid once

the employee is absent from work for an eligible reason. *See* Ordinance Part 2, § 4-19-2(A).

B. As Amended, the Minimum Wage Act Preempts the Inconsistent Ordinance.

The Minimum Wage Act preempts inconsistent local minimum wage laws like the Ordinance. *See* Texas Labor Code § 62.0515 (The “minimum wage provided by this chapter supersedes a wage established in an ordinance . . . governing wages in private employment . . .”). As amended by Section 62.0515, the Minimum Wage Act is not only meant to set a floor for employee pay—but also a ceiling for minimum compensation requirements in the State of Texas.

The Minimum Wage Act’s Section 62.0515 was passed in response to a local ballot initiative to raise the minimum wage in Houston, a home-rule city, and to ensure “the uniform application of the federal minimum wage in private employment at the local level.” *See* Texas Bill Analysis, H.B. 804, 4/25/2003 (Texas Senate Research Center, 78th Legislature, 2003 Regular Session). At the time of the amendment, policymakers noted that the “existence of different minimum wages across the state would cause an accounting nightmare for businesses with offices in multiple communities, which would have to consider and keep track of

different regulations across the state.” Texas Bill Analysis, H.B. 804, 4/7/2003 (Texas House Research Organization, 78th Legislature, 2003 Regular Session).

The prospect of the Ordinance going into effect (especially alongside San Antonio’s recently passed paid leave ordinance) has done exactly what Section 62.0515 was enacted to prevent. ABC, AGC-TBB, and TCA employers have many (and sometimes dozens of) temporary jobsites in communities throughout Texas. In determining whether to bid a project in Austin (and how high to bid a project in Austin, if at all), a construction company based in Austin or elsewhere must now consider the accounting nightmare and substantial administrative costs of employing workers in the city, often for only a few days, weeks, or months of a year.

These costs are exacerbated by the Ordinance’s definitions of “employee” and “employer,” which require all employers (regardless of where the employer is located) to pay for leave taken by employees who have performed at least 80 hours of work for pay within Austin’s city limits. See Ordinance Part 2, § 4-19-1(D). It is not unusual for an employee in the construction industry to travel from his hometown to Austin, San Antonio, or another home-rule city in Texas in order to work

a job. Indeed, before the Ordinance, it was not at all inconceivable for a construction employee to work in many of Texas's major cities in a calendar year.

But tracking employees' hours city-by-city, posting legally required notices of paid sick leave obligations, keeping employees monthly posted on the hours they've accrued and used in each city, and complying with a patchwork of city regulations will now burden the industry's employers and prevent employees from working jobs that would have otherwise been available to them.

In order to prevent the City of Austin's circumvention of the Texas Legislature's enacted interest in statewide uniformity and its vitiation of the amended Minimum Wage Act's purposes, the Ordinance must be halted.

PRAYER

WHEREFORE, *Amici* respectfully request that the Court reverse the prior order and enter a temporary injunction to stay Austin's Paid Sick Leave Ordinance or remand to the trial court with instructions that it enter an order granting a temporary injunction against the Ordinance.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

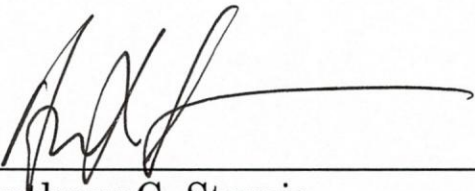
Pursuant to Tex. R. App. P. 9.4, I hereby certify on behalf of *Amici Curiae*, that the foregoing brief contains 1136 words, excluding the portions of the brief exempted by Rule 9.4(i)(1). This is a computer-generated document created in Microsoft Word, using 14-point typeface for all text, except for footnotes which are in 12-point typeface. In making this certificate of compliance, I am relying on the word count provided by the software used to prepare this document.



Anthony G. Stergio

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing brief has, through the electronic filing manager, been electronically served on all parties or their attorneys of record in compliance with the Texas Rules of Appellate Procedure 9.5(b) on the 31st day of August, 2018.



Anthony G. Stergio