Fourth Court of Appeals
San Antonio, Texas

OPINION

No. 04-20-00004-CV

Marilyn **WASHINGTON**; Texas Organizing Project Education Fund; City of San Antonio, Texas; Ron Nirenberg, Mayor of the City of San Antonio; Erik Walsh, City Manager of the City of San Antonio; and Jennifer Herriot, Interim Director of the San Antonio Metropolitan Health District,
Appellants

v.

ASSOCIATED BUILDERS & CONTRACTORS OF 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; Employers 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; Texas Retailers Association; Association of Convenience Store Retailers; South Texas Merchants Associations; and the State of Texas,
Appellees

From the 408th Judicial District Court, Bexar County, Texas
Trial Court No. 2019CI13921
Honorable Peter Sakai, Judge Presiding

Opinion by: Patricia O. Alvarez, Justice

Sitting: Patricia O. Alvarez, Justice
Irene Rios, Justice
Beth Watkins, Justice

Delivered and Filed: March 10, 2021

MOTION TO DISMISS DENIED; ORDER AFFIRMED

After the City of San Antonio passed an ordinance requiring private employers to pay employees for sick and safe leave, several employers sued the City. The employers argued the

Texas Minimum Wage Act (TMWA) preempts the ordinance and they sought a temporary injunction to prevent it from taking effect. The trial court granted the temporary injunction, and this appeal ensued. Because the ordinance's paid sick and safe leave provision establishes a minimum wage, which is inconsistent with the TMWA and thus violates the Texas Constitution, we affirm the trial court's order.

BACKGROUND

In August 2018, in response to an electors' petition to initiate an ordinance, the San Antonio City Council passed an ordinance titled "Paid Sick Leave Ordinance." SAN ANTONIO, TEX., CODE OF ORDINANCES ch. 15, art. XI, §§ 15-269–15-280 (2018). The Ordinance required private employers to pay employees for time taken as sick leave; it was to take effect on August 1, 2019. After the Ordinance was passed, the City sought input from business leaders and community advocates on possible amendments.

In mid-July 2019, a group of businesses and business associations sued the City and some of its officials (the City) seeking to temporarily and permanently enjoin enforcement of the Ordinance. The plaintiffs asserted the Ordinance was preempted by the TMWA and it violated the plaintiffs' due course of law, equal protection, and freedom of association rights, as well as the prohibition against unreasonable searches.

A few days later, more entities petitioned to intervene. Marilyn Washington, MOVE Texas Action Fund (MOVE),[1] and Texas Organizing Project Education Fund (TOP) intervened as Intervenor-Defendants. As Intervenor-Plaintiffs, three more business associations intervened to support all the claims. We will refer to all the business and business association plaintiffs as the Business Parties. The State of Texas also intervened to support the preemption claim.

[1] Before Appellants' appealed, MOVE withdrew as a putative intervenor-defendant.

In late July 2019, the original plaintiffs and the City agreed to stay implementation of the Amended Ordinance until December 1, 2019. After more discussions, in October 2019, the City Council passed several amendments to the Ordinance, renumbered it Ordinance No. 2019-10-03-0795, and renamed it the "Sick & Safe Leave Ordinance." SAN ANTONIO, TEX., CODE OF ORDINANCES ch. 15, art. XI, §§ 15-269–15-281 (2019) (Amended Ordinance).

Section 15-272 of the Amended Ordinance states as follows:

> (a) General. An employer shall provide an employee with sick and safe leave that meets the requirements of this article in an amount up to the employee's available sick and safe leave. The employer shall provide sick and safe leave at the rate of pay that 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.
>
> (b) Accrual requirements and yearly cap.
>
> (1) An employer shall grant an employee one hour of sick and safe leave for every thirty (30) hours worked for the employer in the city of San Antonio. . . .
>
> (2) Sick and safe leave shall accrue starting at the commencement of employment or the date this article is effective, whichever is later.

After an evidentiary hearing, the trial court signed an order that found, inter alia, that the Business Parties pled and proved all the essential elements necessary to support a temporary injunction. It granted the temporary injunction, suspended the Amended Ordinance, ordered the Business Parties to post a bond, and set a trial date.

Intervenor-Defendants appeal; they argue the trial court abused its discretion by (1) misapplying the law regarding preemption, (2) finding imminent and irreparable injury without any evidence, and (3) rendering an overbroad injunction order.

MOTION TO DISMISS APPELLANTS, STRIKE BRIEF

As a threshold matter, we address the Business Parties' pending motion to dismiss Washington and TOP from this appeal.

A. Business Parties' Motion to Dismiss

After the record and briefs were filed, the Business Parties moved to strike Washington and TOP's brief and dismiss them from this appeal for want of jurisdiction. The Business Parties assert that Washington and TOP have no appellate standing to challenge the trial court's order and that "[t]he City alone is entitled to . . . defend its own ordinances."

B. Washington, TOP Response

In response, Washington and TOP insist they have particularized injuries and have standing to intervene at trial[2] and to appeal from the trial court's order.

C. Discussion

We must make our written opinion "as brief as practicable [while] address[ing] every issue raised and necessary to final disposition of the appeal." TEX. R. APP. P. 47.1; *see In re Guardianship of Thrash*, 610 S.W.3d 74, 75 (Tex. App.—San Antonio 2020, pet. denied).

Here, determining whether Washington and TOP have appellate standing is not necessary to the final disposition of this appeal. The City timely filed its own notice of appeal, adopted Washington and TOP's brief in its entirety, and prayed for the trial court's temporary injunction order to be reversed. Notably, the Business Parties do not ask this court to dismiss Washington and TOP from this *suit*, they ask only that we strike Washington and TOP's brief and dismiss them from this *appeal*. Even if we were to do so, we would not strike the City's adopted brief, and the issues presented would not change. Therefore, we deny as moot the Business Parties' motion to dismiss Washington and TOP as appellants and to strike their brief.

[2] The Business Parties also moved to dismiss Washington and TOP's intervention in the trial court, but the Business Parties assert the trial court has not yet ruled on the motion. We express no opinion on whether Washington and TOP may intervene in the underlying suit.

We turn now to Appellants' issues beginning with the essential elements and standard of review for a temporary injunction.

TEMPORARY INJUNCTION

"To obtain a temporary injunction, the applicant must plead and prove three specific elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim." *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002) (citing *Walling v. Metcalfe*, 863 S.W.2d 56, 57 (Tex. 1993); *Sun Oil Co. v. Whitaker*, 424 S.W.2d 216, 218 (Tex. 1968)).

"An applicant for injunction must establish its probable right to recovery and a probable injury by competent evidence adduced at a hearing." *Ron v. Ron*, 604 S.W.3d 559, 568 (Tex. App.—Houston [14th Dist.] 2020, no pet.); *accord Goldthorn v. Goldthorn*, 242 S.W.3d 797, 798 (Tex. App.—San Antonio 2007, no pet.).

"An injury is irreparable if the injured party cannot be adequately compensated in damages or if the damages cannot be measured by any certain pecuniary standard." *Butnaru*, 84 S.W.3d at 204; *accord Cheniere Energy, Inc. v. Parallax Enters. LLC*, 585 S.W.3d 70, 76 (Tex. App.—Houston [14th Dist.] 2019, pet. dism'd).

STANDARD OF REVIEW

"The decision to grant or deny a temporary writ of injunction lies in the sound discretion of the trial court, and the court's grant or denial is subject to reversal only for a clear abuse of that discretion." *Walling*, 863 S.W.2d at 58; *accord Butnaru*, 84 S.W.3d at 204. Of course, "[a] trial court has no 'discretion' in determining what the law is or applying the law to the facts." *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992); *accord Ex parte E.H.*, 602 S.W.3d 486, 489 (Tex. 2020). And when an overarching abuse of discretion standard applies, if there are underlying

questions of law, we review those questions de novo. *See Ex parte E.H.*, 602 S.W.3d at 489; *Perry Homes v. Cull*, 258 S.W.3d 580, 598 (Tex. 2008).

A trial court does not abuse its discretion if it applies the law correctly and some evidence reasonably supports its ruling. *See Abbott v. Anti-Defamation League Austin, Sw., & Texoma Regions*, 610 S.W.3d 911, 916 (Tex. 2020) (quoting *Henry v. Cox*, 520 S.W.3d 28, 34 (Tex. 2017)). "[To] determine[e] whether there has been an abuse of discretion, we view the evidence in the light most favorable to the trial court's temporary injunction ruling, and [we] indulge every legal presumption in favor of its ruling." *Talisman Energy USA, Inc. v. Matrix Petrol., LLC*, No. 04-15-00791-CV, 2016 WL 7379254, at *2 (Tex. App.—San Antonio Dec. 21, 2016, no pet.) (mem. op.); *accord Cheniere Energy*, 585 S.W.3d at 77.

In our review, we "must not substitute [our] judgment for the trial court's judgment unless the trial court's action was so arbitrary that it exceeded the bounds of reasonable discretion." *Butnaru*, 84 S.W.3d at 204 (citing *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 918 (Tex. 1985); *Davis v. Huey*, 571 S.W.2d 859, 861–62 (Tex. 1978)).

If an applicant pleads and proves each essential element to grant the temporary injunction for an independent cause of action, any trial court error pertaining to other independent causes of action is harmless because the pled and proven independent ground fully supports the temporary injunction. *See* TEX. R. APP. P. 44.1(a)(1) (harmless error); *cf. Talisman Energy*, 2016 WL 7379254, at *4 ("We have already concluded that section 16 provided an independent ground for the temporary injunction. Therefore, even if the trial court had abused its discretion in excluding the expert's testimony, any error in excluding the testimony would be harmless."); *Oliphant Fin. LLC v. Angiano*, 295 S.W.3d 422, 424 (Tex. App.—Dallas 2009, no pet.) ("If an independent ground fully supports the complained-of ruling or judgment, but the appellant assigns no error to that independent ground, we must accept the validity of that unchallenged independent ground,

and thus any error in the grounds challenged on appeal is harmless because the unchallenged independent ground fully supports the complained-of ruling or judgment.").

AMENDED ORDINANCE PREEMPTION BY TMWA

In their first issue, Appellants argue the trial court misapplied the law regarding preemption and erroneously granted the temporary injunction.

Petitioning for injunctive relief, the Business Parties pled multiple causes of action. But as the parties' briefing reflects, the pivotal claim is whether the Amended Ordinance is preempted by the TMWA.

The State joined the Business Parties' preemption claim, and the Business Parties adopted the State's argument on this issue. The City adopted Washington and TOP's arguments. For convenience, we will refer to the plaintiffs' and intervenor-plaintiffs' arguments as the State's, and the defendants' and intervenor-defendants' arguments as the City's.

A. City's Arguments[3]

The City argues the trial court abused its discretion by granting the temporary injunction because the State did not prove its probable right to the relief sought. It acknowledges that "a local ordinance that 'governs wages' as contemplated in the TMWA is preempted by State law," but it contends the Amended Ordinance's plain language shows sick and safe leave is not a wage, and thus the Amended Ordinance is not preempted by the TMWA.

[3] In their briefs, the City and amici present policy arguments for how paid sick and safe leave would benefit many private employees in San Antonio, and the Business Parties present competing policy arguments. But our role in this case is constitutionally limited to construing the statute and ordinance, not balancing competing interests. *See Abbott v. Anti-Defamation League Austin, Sw., & Texoma Regions*, 610 S.W.3d 911, 924 (Tex. 2020) (Guzman, J., concurring) (citations omitted) ("[T]he Texas Constitution commits the balancing of competing interests and policy objectives to the executive and legislative branches of government. The judiciary's function is only to say what the law is, not what it should be. In our constitutional role, judges are not empowered to substitute our policy choices, preferences, or rules for those of the coordinate branches.").

The City also contends the proper definition of wage under the TMWA is "a fixed regular payment owed for work performed." In the City's view, sick and safe leave is not fixed in amount, is thus not a wage, and therefore the Amended Ordinance is not preempted by the TMWA.

B. State's Arguments

The State argues paid sick leave is a wage as that term is used in the TMWA. The State, like the City, relies on multiple dictionary definitions to support its definition of wage—and its conclusion that paid sick leave is a wage. It contends that "[p]aid sick leave is a 'wage' under the plain meaning of that term as confirmed by the statutory context, especially since it is accrued by hours worked and 'pa[id] . . . in an amount . . . no less than the state minimum wage.'" The State also insists that the Amended Ordinance's requirement for private employers to pay for sick leave is preempted by the TMWA, and the Amended Ordinance is invalid.

C. Applicable Law

"When reviewing the validity of a city ordinance, we begin with the presumption that the ordinance is valid." *City of San Antonio v. Greater San Antonio Builders Ass'n*, 419 S.W.3d 597, 601 (Tex. App.—San Antonio 2013, pet. denied); *accord RCI Entm't (San Antonio), Inc. v. City of San Antonio*, 373 S.W.3d 589, 595 (Tex. App.—San Antonio 2012, no pet.).

"[A state statute] and a city ordinance will not be held repugnant to each other if any other reasonable construction leaving both in effect can be reached." *Dall. Merchs. & Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 491 (Tex. 1993) (quoting *City of Beaumont v. Fall*, 291 S.W. 202, 206 (Tex. [Comm'n App.] 1927)); *accord BCCA Appeal Grp., Inc. v. City of Houston*, 496 S.W.3d 1, 7 (Tex. 2016).

However, "[a]n 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." *Dall. Merchs.*, 852 S.W.2d at 491; *accord BCCA Appeal Grp.*, 496 S.W.3d at 7. And when the

legislature's intent to preempt a subject matter is unmistakably clear and the ordinance conflicts with the statute, the state statute controls. *BCCA Appeal Grp.*, 496 S.W.3d at 7; *Dall. Merchs.*, 852 S.W.2d at 491.

D. *Texas Association of Business v. City of Austin, Texas*

Before we examine the Amended Ordinance, we review the analysis from our sister court's decision in *Texas Association of Business v. City of Austin, Texas*. 565 S.W.3d 425 (Tex. App.—Austin 2018, pet. denied).

In that case, the City of Austin enacted an ordinance which was quite similar to the City of San Antonio's Amended Ordinance. The Austin ordinance required Austin private employers to "grant an employee one hour of earned sick time for every 30 hours worked." *Id.* at 430. The State asked the court to declare that the ordinance was preempted by the TMWA and to enjoin the ordinance's enforcement. *Id.* at 431. In its analysis of whether the State pled and proved a probable right to relief, the court determined that the "legislative intent in the TMWA to preempt local law is clear," and it turned to the question of whether the Austin ordinance established a wage. *Id.* at 439.

The court recognized that "[t]he TMWA does not define 'wage' so [it looked to dictionary definitions to] give that word its ordinary meaning." *Id.* Based on the definitions it cited, the court concluded that "'[w]age' refers to a 'payment to a person for service rendered . . . . The amount paid periodically, esp. by the day or week or month, for the labour or service of an employee, worker, or servant.'" *Id.* (quoting *Compact Oxford English Dictionary* 693 (2d. ed. 1989)) (citing *Webster's Third New Int'l Dictionary* 2568 (2002) (defining "wage" as "a pledge or payment of usu. monetary remuneration by an employer esp. for labor or services")).

Applying the common meaning of the TMWA's plain language, the court determined the Austin ordinance was preempted by the TMWA if the ordinance "establishes the payments a

person receives for services rendered." It then concluded "[t]he [Austin] Ordinance establishes the payment that a person receives for services rendered to an employer." *Texas Ass'n of Bus.*, 565 S.W.3d at 439. The court added that under the Austin ordinance, "employees who take sick leave will receive more pay per hour than actually worked. Thus, the [Austin] Ordinance establishes a wage." *Id.* at 440.

The court held that the Austin ordinance was preempted by the TMWA as a matter of law, the ordinance was unconstitutional, and "the Private Parties and the State [had] conclusively established a probable right to relief sought on their preemption claim." *Id.* at 441.

E. Discussion

We turn now to the pivotal question in this appeal: whether the Amended Ordinance is preempted by the TMWA and thus unconstitutional.

1. Preemption on Subject of Minimum Wage

Under the Texas Constitution, a home-rule city may not pass an ordinance that "contain[s] 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); *accord BCCA Appeal Grp.*, 496 S.W.3d at 7. The legislature enacted section 62.0515 which states "the minimum wage provided by this chapter supersedes a wage established in an ordinance . . . governing wages in private employment." TEX. LABOR CODE ANN. § 62.0515(a); *accord Tex. Ass'n of Bus.*, 565 S.W.3d at 439.

The phrase "wage established in an ordinance" is stated in the context of "the minimum wage provided by this chapter," TEX. LABOR CODE ANN. § 62.0515, and the statute does not prevent employers from paying employees more than the minimum wage required by the Act, *see, e.g.*, TEX. LABOR CODE ANN. § 62.005 ("Collective Bargaining Not Impaired"). Thus, the TMWA's plain language states with unmistakable clarity the legislature's intent to preempt a

home-rule city's ordinance which establishes a mandatory minimum wage. *See City of Houston v. Bates*, 406 S.W.3d 539, 546 (Tex. 2013) ("The Legislature may limit a home-rule city's broad powers when it expresses its intent to do so with 'unmistakable clarity.'"); *see also BCCA Appeal Grp.*, 496 S.W.3d at 7 (same).

Therefore, we hold that the TMWA preempts a home-rule city's ordinance that establishes a mandatory minimum wage. *Cf. Tex. Ass'n of Bus.*, 565 S.W.3d at 439 ("We hold that the Texas Minimum Wage Act preempts local regulations that establish a wage . . . .").

2. Meaning of Wage

Having construed the TMWA regarding preemption, we turn now to determining the legislature's intent in its use of the term wage.

In the TMWA, the legislature did not expressly define wage, but we may discern the legislature's intent from the word's ordinary meaning, the statutory context, and any applicable presumptions. *See EBS Sols., Inc. v. Hegar*, 601 S.W.3d 744, 758 (Tex. 2020) ("When terms are undefined, we will use the plain and ordinary meaning of the term and interpret it within the context of the statute."); *City of Laredo v. Laredo Merchs. Ass'n*, 550 S.W.3d 586, 596 (Tex. 2018). "To determine a term's common, ordinary meaning, we typically look first to dictionary definitions." *Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 838 (Tex. 2018); *see Laredo Merchs.*, 550 S.W.3d at 595 (reviewing dictionary definitions for words' ordinary meanings). Then "[w]e apply the common meaning of [the term] unless a different meaning is apparent from the context or the plain meaning leads to absurd or nonsensical results." *Bates*, 406 S.W.3d at 547; *accord Cadena Comercial USA Corp. v. Tex. Alcoholic Beverage Comm'n*, 518 S.W.3d 318, 325 (Tex. 2017).

3. Dictionary Definitions

Dictionaries define wage as follows:

- "compensation given to a hired person for his or her services. Compensation of employees based on time worked or output of production," *Wages*, BLACK'S LAW DICTIONARY 1416 (5th ed. 1979);
- "payment to a person for service rendered . . . The amount paid periodically, esp. by the day or week or month, for the labour or service of an employee, worker, or servant," *Wage*, COMPACT OXFORD ENGLISH DICTIONARY 693 (2d. ed 1989);
- "[a] payment of money for labor or services usually according to contract and on an hourly, daily, or piecework basis," *Wage*, MERRIAM-WEBSTER'S DICTIONARY OF LAW 529 (1st ed. 1996);
- "a pledge or payment of usu. monetary remuneration by an employer esp. for labor or services," *Wage*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2568 (2002); and
- "a payment usually of money for labor or services usually according to contract and on an hourly, daily, or piecework basis," *Wage*, MERRIAM-WEBSTER.COM DICTIONARY, https://www.merriam-webster.com/dictionary/wage (last visited Feb. 2, 2021).

The common concepts in each definition are a payment, to a person, for the labor or services the person performs. Considering these definitions and their consistent concepts, we conclude the common meaning of wage is a payment to a person for services rendered.

But we must review this meaning in the light of its statutory context and any applicable presumptions. *See EBS Sols.*, 601 S.W.3d at 758.

4. Statutory Context

We first consider this common meaning "within the context of the statute." *See id.* In the TMWA, excluding headings, wages is used nine times and wage is used twelve times. Of the twelve uses of wage, six appear as "minimum wage" and three as "base wage." Although some uses include adjectives that modify wage, e.g., minimum wage, none of the twenty-one uses expressly or impliedly reduces the broad definition of wage, and none requires or suggests any

meaning for wage other than its ordinary meaning. *Cf. id.* at 759 ("Nothing in the statute indicates that we must read [the term at issue] narrowly.").

To test this common meaning, we can substitute it for "wage" to see if the substitution alters the statute's meaning.

a. Section 62.005

For example, section 62.005 states "This chapter does not interfere with or in any way diminish the right of employees to bargain collectively with their employer through representatives chosen by the employees to establish wages that exceed the applicable minimum wage under this chapter." TEX. LABOR CODE ANN. 62.005.

Substituting this common meaning, the statute reads "This chapter does not interfere with or in any way diminish the right of employees to bargain collectively with their employer through representatives chosen by the employees to establish [a payment to a person for services rendered] that exceed the applicable minimum [payment to a person for services rendered]."

b. Section 62.051

Section 62.051 states "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 ANN. 62.051. By substituting this common meaning, it reads "an employer shall pay to each employee the federal minimum [payment to a person for services rendered] under [the FLSA]."

c. Section 62.0515

Section 62.0515 states "[T]he 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." TEX. LABOR CODE ANN. § 62.0515.

Substituting this common meaning, the statute reads "the minimum [payment to a person for services rendered] provided by this chapter supersedes a [payment to a person for services

rendered] established in an ordinance, order, or charter provision governing [payments to a person for services rendered] in private employment, other than [payments to a person for services rendered] under a public contract." TEX. LABOR CODE ANN. § 62.0515.

d. Meaning Leaves Statute Unchanged

As shown by these examples, substituting this common meaning does not alter the statute's meaning or lead to an absurd result. *See Cadena Comercial*, 518 S.W.3d at 325; *Bates*, 406 S.W.3d at 547. We next consider any applicable presumptions.

5. Presumption of Broad Meaning

"Normally, when a term within a statute is susceptible to either a broad or a narrow meaning, we will presume that the broader meaning of the term is intended, being sensitive to the term's context in the statute." *EBS Sols.*, 601 S.W.3d at 758 (quoting *Cadena Comercial*, 518 S.W.3d at 327) ("If an undefined word used in a statute has multiple and broad definitions, we presume—unless there is clear statutory language to the contrary—that the Legislature intended it to have equally broad applicability.").

The statute's plain language that allows employers "to establish wages that exceed the applicable minimum wage," *see* TEX. LABOR CODE ANN. § 62.005, shows the legislature recognized that there is more than one type of wage. Further, none of the Act's other uses of wage contradict, much less clearly contradict, such a broad definition. *See Cadena Comercial*, 518 S.W.3d at 327.

6. Defining Wage

Having considered the common meaning of wage, its statutory context, and the applicable presumption, we again conclude that wage as used in the TMWA means a payment to a person for services rendered. *See EBS Sols.*, 601 S.W.3d at 758; *cf. Tex. Ass'n of Bus.*, 565 S.W.3d at 440. We turn now to address the parties' arguments on the definition of wage.

F. City's Proposed Definition of Wage

The City acknowledges that the TMWA preempts the establishment of a wage, but it insists the Amended Ordinance's safe and sick leave is not a wage. To support its assertion, the City presents six dictionary definitions for wage. Five of the six definitions are quite similar, and we recite the two the City argues are "most instructive" because they were the definitions in use when the FLSA was enacted.

- "A payment to a person for service rendered; now esp. the amount paid periodically for the labour or service of a workman or servant." *Wage*, THE SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES (1933).
- "A compensation given to a hired person for his or her services; the compensation agreed upon by a master to be paid to a servant, or any other person hired to do work or business for him;" and "[a]greed compensation for services by workmen, clerks or servants—those who have served an employer in a subordinate or menial capacity and who are supposed to be dependent upon their earnings to pay for their present support, whether they are paid by the hour, the day, the week, the month, the job, or the piece." *Wages*, BLACK'S LAW DICTIONARY 1826 (3d ed. 1930).

The City defines "wage" under the TMWA as "a fixed regular payment owed for work performed." It concludes that "the proper construction of 'wages' under the TMWA is those payments for work performed that are (1) earned on a fixed basis, not subject to a cap, and (2) for which an employee has an absolute right of payment, regardless of separation from employment or the existence of contingencies that may never occur (such as a qualifying illness)." Although one online dictionary defines wage as a "fixed regular payment earned for work or services," *see* OXFORD ENGLISH AND SPANISH DICTIONARY, THESAURUS, AND SPANISH TO ENGLISH TRANSLATOR, lexico.com/definition/wage (last visited Feb. 2, 2021), the other five dictionary definitions the City cites do not include "fixed regular payment."

Nowhere does the TMWA expressly or impliedly limit wage to a fixed regular payment. If we were to ignore the overwhelming majority of dictionary definitions and define wage as a

fixed regular payment, we would exclude payments that are not fixed and regular, and we would contravene the TMWA—which imposes no such limitations on the definition of wage. *Cf.* TEX. LABOR CODE ANN. §§ 62.001–.205. We cannot adopt the City's restrictive definition.

G. State's Proposed Definition of Wage

In its argument, the State presents four dictionary definitions for wage. The State quotes Black's Law Dictionary, fifth edition, and Merriam-Webster's Collegiate Dictionary, eleventh edition, both of which we have already quoted. The State asserts Black's Law Dictionary, fourth edition, has a similar definition to the fifth edition, and we do not repeat it here. Finally, the State's fourth cited definition for wage is "[a] regular payment, usually on an hourly, daily, or weekly basis, made by an employer to an employee." *Wage*, THE AMERICAN HERITAGE DICTIONARY 1946 (5th ed. 2016).

Having considered the common meaning of wage, its statutory context, the applicable presumption, and the parties' arguments, *see EBS Sols.*, 601 S.W.3d at 758, we now hold that wage as used in the TMWA means a payment to a person for services rendered, *cf. Tex. Ass'n of Bus.*, 565 S.W.3d at 440.

H. Amended Ordinance Establishes a Wage

We turn now to whether the Amended Ordinance establishes a minimum wage. The Amended Ordinance requires employers to "provide sick and safe leave at the rate of pay that 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." § 15-272(a). As *Texas Association of Business* explains, an ordinance which requires employers to pay sick leave means employers must pay those "employees who earn and take [sick and safe leave] more than employees who work the same hours without paid sick leave." *Tex. Ass'n of Bus.*, 565 S.W.3d at 440. Thus, the Amended Ordinance's paid sick and safe leave requirement establishes

a minimum wage. *Contra* TEX. LABOR CODE ANN. § 62.0515; *cf. Tex. Ass'n of Bus.*, 565 S.W.3d at 440.

I. Not Fixed Payment Argument

Citing cases from Massachusetts and Wisconsin, the City argues that sick and safe leave cannot be a wage because the payments "are not 'fixed' in amount" and the employee has no "absolute right of payment." But the foreign jurisdiction cases the City cites were not construing the TMWA, and the City's restrictive interpretation of wage is not supported by the common meaning of wage viewed in context of the TMWA and the applicable presumption. *See EBS Sols.*, 601 S.W.3d at 758–59. The City's fixed payment argument is not sound.

J. Minimum Wage Calculation Argument

The City also argues that sick and safe leave cannot be a wage because the TMWA allows an employer to include tips, *see* TEX. LABOR CODE ANN. § 62.052, and its costs for providing meals and lodging, *see id.* § 62.053, to employees in "computing the wage paid to an employee," *see id.*, but the TMWA does not include sick leave as part of the minimum wage calculation.

This reasoning confuses the definition of wage with the specific types of wages used in calculating the minimum wage. The broad definition of wage—meaning a payment a person receives for services rendered—can include base pay, overtime pay, holiday pay, vacation pay, etc. But just because the TMWA's formula for what types of wages are used to calculate the minimum wage does not expressly include paid sick leave, that formula's operands do not alter the definition of wage—which includes paid sick and safe leave. The City's wage calculation argument is invalid.

K. Absurd Results Argument

Finally, the City argues that "reading a more expansive definition of wages [than the restrictive definition the City offers] into the TMWA would yield absurd results." But the absurd

results the City imagines are based on its flawed construction of the TMWA and its misunderstanding of the TMWA's limited invocation of the FLSA. The City's absurd results argument is inapt.

L. TMWA Preempts Ordinance

Notwithstanding the City's arguments, we hold as a matter of law that the Amended Ordinance's mandatory sick and safe leave provision establishes a minimum wage. We further hold that the TMWA supersedes the Amended Ordinance's paid sick and safe leave provision, which makes the Amended Ordinance unconstitutional, and the State conclusively established its probable right to the relief sought on its preemption claim. *Cf. Tex. Ass'n of Bus.*, 565 S.W.3d at 440.

We overrule the City's first issue.

IMMINENT, IRREPARABLE INJURY

Having determined that the State conclusively established its probable right to the relief sought on its preemption claim, we turn to the City's second issue.

A. City's Arguments

In its second issue, the City argues that the trial court abused its discretion in granting the temporary injunction because neither the Business Parties nor the State presented any evidence of a probable, imminent, and irreparable injury. The City also contends the trial court's order "did not explain the injury the State would suffer or why, or explicitly endorse the State's conception of injury to sovereignty, and the injunction order should accordingly be reversed for failure to comply with [Rule] 683."

B. State's Arguments

The State responds that preemption is a question of law, and it did not need to present any particularized evidence to show how it was being harmed by "an ordinance that contravenes a duly

enacted state law." The State also asserts that the trial court's order clearly shows it agreed with the State's claim of irreparable injury to its sovereignty.

C. Applicable Law

The Texas Constitution states that, for cities with a population of 5,000 or more, "no charter or any ordinance passed under said charter 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; *accord City of Laredo v. Laredo Merchs. Ass'n*, 550 S.W.3d 586, 592 (Tex. 2018).

The TMWA, a general law enacted by the State, specifies that "the minimum wage provided by this chapter supersedes a wage established in an ordinance . . . governing wages in private employment." TEX. LABOR CODE ANN. § 62.0515.

D. Discussion

The City argued neither the Business Parties nor the State produced evidence of probable, imminent, and irreparable injury, but we address only the State's claimed injury—that its sovereignty would be irreparably injured by the City's Amended Ordinance.

The City of San Antonio is a home-rule city with a population over 5,000, and article XI, section 5 applies to the City. *See* TEX. CONST. art. XI, § 5; *Vernon v. State ex rel. City of San Antonio*, 406 S.W.2d 236, 239 (Tex. App.—Corpus Christi 1966, writ ref'd n.r.e.). We have already determined that the Amended Ordinance's sick and safe leave provision establishes a minimum wage, which conflicts with, and is preempted by, the TMWA. The remaining questions are whether the State established it would suffer an irreparable injury if the Amended Ordinance took effect and whether the trial court accepted that argument and identified the injury.

In its order granting the injunction, the trial court found that "the Amended Ordinance conflicts with and is pre-empted [sic] by the Texas Constitution" and the "State will probably and

imminently suffer irreparable harm and injury under the Texas Constitution for which [it] will have no adequate legal remedy."

Like the trial court, our sister court, and the Supreme Court, we agree that the "inability [of a state] to enforce its duly enacted [laws] clearly inflicts irreparable harm on the State." *Tex. Ass'n of Bus.*, 565 S.W.3d at 441 (alterations in original) (quoting *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018)). Thus, given the State pled and proved each essential element for the trial court to grant the temporary injunction on the State's preemption claim, we conclude the trial court did not abuse its discretion. *See Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002); *see also Abbott v. Anti-Defamation League Austin, Sw., & Texoma Regions*, 610 S.W.3d 911, 916 (Tex. 2020).

We overrule the City's second issue.

Because the trial court did not abuse its discretion in granting the temporary injunction on the State's preemption claim, we need not determine whether the Business Parties pled and proved each essential element for their other independent causes of action. *See* TEX. R. APP. P. 44.1(a)(1) (harmless error); *cf. Talisman Energy USA, Inc. v. Matrix Petrol., LLC*, No. 04-15-00791-CV, 2016 WL 7379254, at *4 (Tex. App.—San Antonio Dec. 21, 2016, no pet.) (mem. op.); *Oliphant Fin. LLC v. Angiano*, 295 S.W.3d 422, 424 (Tex. App.—Dallas 2009, no pet.).

OVERBROAD INJUNCTION ORDER

We turn now to the appellants' third and final issue.

A. City's Arguments

The City argues the trial court's order was an abuse of discretion because the trial court should have severed any unconstitutional provision from the Amended Ordinance, construed the remaining provisions as creating unpaid sick and safe leave, and allowed the remaining provisions

to take effect. The City also complains that the order grants the Business Parties and the State more relief than they would be entitled to by a final judgment.

B. State's Arguments

The State argues the condition precedent to invoke the severance clause was not met, and even if severance was invoked or available, the trial court could not have severed the remaining provisions without rewriting the statute into an unpaid sick leave ordinance. The State contends the trial court properly granted its requested temporary injunction which was not overbroad because the Amended Ordinance's remaining provisions could not properly be severed.

C. Severability Provision

Section 15-280 addresses severability of the Amended Ordinance:

> It is hereby declared to be the intention of the city council that the sections, paragraphs, sentences, clauses and phrases of this chapter are severable, and if any phrase, clause, sentence, paragraph or section of this chapter shall be declared unconstitutional by the valid judgment or decree of any court of competent jurisdiction, such unconstitutionality shall not affect any of the remaining phrases, clauses, sentences, paragraphs and sections of this chapter, since the same would have been enacted by the city council without the incorporation in this chapter of any such unconstitutional phrase, clause, sentence, paragraph or section.

The provision makes clear the City's intent, in the event any portion of the Amended Ordinance is determined to be unconstitutional, that the remainder of the ordinance continue in effect, and the Amended Ordinance's specific provision controls over a general severability rubric. *See* TEX. GOV'T CODE ANN. § 311.032(a) ("If any statute contains a provision for severability, that provision prevails in interpreting that statute."); *City of Houston v. Bates*, 406 S.W.3d 539, 549 (Tex. 2013) ("When an ordinance contains an express severability clause, the severability clause prevails when interpreting the ordinance.").

D. When Severance is Proper

As we have previously stated, "[a state statute] and a city ordinance will not be held repugnant to each other if any other reasonable construction leaving both in effect can be reached." *Dall. Merchs. & Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 491 (Tex. 1993) (quoting *City of Beaumont v. Fall*, 291 S.W. 202, 206 (Tex. [Comm'n App.] 1927)); *accord BCCA Appeal Grp., Inc. v. City of Houston*, 496 S.W.3d 1, 7 (Tex. 2016).

However, if the statute and ordinance conflict, and a portion of the ordinance is unconstitutional, severing the remaining provisions may be proper "[i]f, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected." *Rose v. Doctors Hosp.*, 801 S.W.2d 841, 844 (Tex. 1990) (quoting *W. Union Tel. Co. v. State*, 62 Tex. 630, 634 (1884)). But if "all the provisions are connected in subject-matter, dependent on each other, [and] operating together for the same purpose . . . [or] they are essentially and inseparably connected in substance," then severance is not proper. *Id.*; *cf. Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 902 (Tex. 2000) (citing *Rose*, 801 S.W.2d at 845).

E. Additional Background

When the temporary injunction hearing was held on November 7, 2019, the Amended Ordinance was not yet in effect. The trial court heard arguments and admitted evidence regarding the impact of granting or denying a temporary injunction to prevent the ordinance from taking effect until after a trial on the merits. The trial court found a temporary injunction would not place an undue burden on the parties, and it granted the injunction to preserve the status quo—where the Amended Ordinance was not yet in effect. *See Khaledi v. H.K. Glob. Trading, Ltd.*, 126 S.W.3d 273, 285 (Tex. App.—San Antonio 2003, no pet.) ("The purpose of a temporary injunction is to preserve the original status of the [matter in dispute] pending a final decision on the rights of the

parties."). The trial court suspended the Amended Ordinance for all purposes pending a full trial on the merits.

F. Discussion

Before we address the City's arguments, we briefly review the Amended Ordinance because its terms and purpose are crucial components in our analysis.

1. Central, Defining Purpose of Amended Ordinance

In its original form, the ordinance was titled the Earned Paid Sick Time ordinance; in its amended form, the ordinance was titled the Paid Sick Leave ordinance. The commission established to study the question was designated the Paid Sick Leave Commission. Nineteen of the twenty-one "WHEREAS" paragraphs in the Amended Ordinance's preamble expressly cite or include a reference to the Earned Paid Sick Time ordinance, the Paid Sick Leave ordinance, or the Paid Sick Leave Commission. The culminating WHEREAS paragraph states the following: "[P]aid sick and safe leave is a matter that directly affects public health and safety and should be adopted and revised as recommended."

In its provisions, the Amended Ordinance expressly defines sick and safe leave as a *paid* benefit: "*Sick and safe leave* means a period of *paid* leave from work accrued by an employee in accord with this article." (second emphasis added). The Amended Ordinance does not create, either expressly of impliedly, any requirement for *unpaid* sick leave.

Based on its plain language, the central, defining purpose of the Amended Ordinance is to require employers to provide employees with *paid* sick and safe leave, and each of the provisions "are connected in subject-matter, dependent on each other, [and] operat[e] together for the same purpose." *See Rose*, 801 S.W.2d at 844 (quoting *W. Union Tel. Co.*, 62 Tex. at 634).

2. Sections City Suggests are Preempted

The City disputes preemption, but it argues that even if parts of the Amended Ordinance were preempted, the temporary injunction grants the State excess relief, and the order should be reversed. The City also contends the trial court should have severed the three sections identified in the trial court's order and allowed the remainder of the Amended Ordinance to take effect.

In paragraphs 6, 7, and 8, the trial court's order identifies three subsections of section 15-272, "Sick and safe leave requirements," by number: 15-272(a), 15-272(b)(1), and 15-272(b)(3). In paragraph 10, the order specifies that the "State demonstrated a probable right to relief and a likelihood of prevailing on [its] claim that the Amended Ordinance conflicts with and is pre-empted [sic] by the Texas Constitution."

We agree that the order implies that the three named subsections conflict with, and are preempted by, the constitution.

3. Virtually All Sections Affected

But nowhere does the order state that the three subsections identified in paragraphs 6, 7, and 8 are the *only* portions of the Amended Ordinance that are preempted by the TMWA; that is clearly not the case. For example, section 15-269, "Definitions," which was not expressly identified in the trial courts' order, defines sick and safe leave as "a period of *paid* leave from work accrued by an employee in accord with this article."[4] (emphasis added). The term sick and safe leave—which is defined as and necessarily means *paid* sick leave—appears in virtually every section of the Amended Ordinance. Thus, when the trial court correctly determined that the mandatory paid sick and safe leave provision was preempted, it necessarily recognized that striking the paid sick and safe leave provision affected virtually every section of the Amended Ordinance.

[4] Using "this article" to mean Chapter 15, Article XI, "Sick and Safe Leave Benefits."

Cf. Rose, 801 S.W.2d at 844 (quoting *W. Union Tel. Co.*, 62 Tex. at 634) (addressing circumstances where "all the provisions are connected in subject-matter, dependent on each other"). Those remaining Amended Ordinance provisions, which do not expressly address paid sick and safe leave, are ancillary provisions whose purpose is to provide the reporting and enforcement provisions for paid sick and safe leave. *Cf. id.* ("operating together for the same purpose").

4. Severance Not Proper

After the trial court determined that the Amended Ordinance established a wage, it necessarily found that the central purpose of the Amended Ordinance was likely preempted and unconstitutional, and virtually "all the provisions are connected in subject-matter, dependent on each other, [and] operating together for the same purpose." *See id.* The trial court could not have severed the few remaining provisions because, without the trial court adding words to rewrite the provisions, *see Geeslin v. State Farm Lloyds*, 255 S.W.3d 786, 799 (Tex. App.—Austin 2008, no pet.) (recognizing courts may not "write words into [a] statute"), "that which remain[ed was not] complete in itself, and [was not] capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected." *See Rose*, 801 S.W.2d at 844 (quoting *W. Union Tel. Co.*, 62 Tex. at 634).

We conclude the trial court did not abuse its discretion by not severing the ordinance's other provisions that were designed to support the central purpose of requiring paid sick and safe leave and were "essentially and inseparably connected in substance," *see id.*, and its order was not impermissibly overbroad, *cf. Khaledi*, 126 S.W.3d at 285 ("Generally, a trial court does not abuse its discretion if it grants a temporary injunction that exceeds the relief the applicant seeks so long as the terms of the injunction are necessary to give full effect to the injunction sought.").

We overrule the City's third issue.

CONCLUSION

The pivotal question we have answered is whether the Amended Ordinance's sick and safe leave requirement establishes a minimum wage: it does. Although the TMWA does not define wage, we have discerned the legislature's intent by applying the word's common meaning, including the presumption that wage retains its broad meaning, and considering its meaning in the statute's context. Having construed the TMWA and the Amended Ordinance, we hold that the Amended Ordinance's paid sick and safe leave provision establishes a minimum wage, which is inconsistent with the TMWA, and thus violates the Texas Constitution. Because the State pled and proved each essential element to support a temporary injunction on its independent ground of preemption, and the trial court's order was not overbroad, we affirm the trial court's order.

Patricia O. Alvarez, Justice