ORAL ARGUMENT REQUESTED

No. 05-13-00255-CV

IN THE COURT OF APPEALS
FOR THE FIFTH JUDICIAL DISTRICT OF TEXAS
AT DALLAS

CONSUMER SERVICE ALLIANCE OF TEXAS, INC.; TITLEMAX OF TEXAS, INC.; and ACE CASH EXPRESS, INC.,

Appellants,

v.

CITY OF DALLAS, TEXAS,

Appellee.

On Appeal from the 14th Judicial District Court of Dallas County, Texas
Cause No. 11-08739-A

APPELLEE'S BRIEF

THOMAS P. PERKINS, JR.
Dallas City Attorney

Barbara E. Rosenberg
Texas Bar No. 17267700
Jennifer C. Wang
Texas Bar No. 24049537
James B. Pinson
Texas Bar No. 16017700
Assistant City Attorneys

City Attorney's Office
1500 Marilla Street, Room 7BN
Dallas, Texas 75201

Telephone: 214-670-3519
Telecopier: 214-670-0622

Barbara.Rosenberg@dallascityhall.com
Jennifer.Wang@dallascityhall.com
James.Pinson@dallascityhall.com

ATTORNEYS FOR APPELLEE

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STATEMENT OF THE CASE

Nature of the Case: CSAT, a trade association comprised of "credit access businesses" (or "CABs") that arrange for payday and vehicle title loans to individuals, along with TitleMax and ACE, as intervenor members of CSAT, sued the City of Dallas to enjoin enforcement of an ordinance placing restrictions on the credit extended through such loans. (CR 6-9, 86-87.) All three parties jointly sought declaratory and injunctive relief, alleging that the City's ordinance was preempted by the Texas Finance Code. (CR 209-19.)

Course of Proceedings: The City filed an original plea to the jurisdiction, special exceptions, and answer on August 8, 2011. (CR 15-77.) CSAT responded by filing its first amended petition. (CR 78-85.) TitleMax and ACE then intervened. (CR 86-95.) The City filed a second, consolidated plea to the jurisdiction, special exceptions, and answer. (CR 96-177.) The trial court sustained those special exceptions in part. (CR 180-81.) Appellants jointly filed a further amended petition. (CR 182-197.) The City, again, filed special exceptions to the joint second amended petition (CR 198-285), and Appellants filed a joint third amended petition (CR 209-27). The City filed its plea to the jurisdiction as to the joint third amended petition asserting that the trial court lacked subject-matter jurisdiction to construe, declare invalid, or enjoin enforcement of the City's penal ordinance and that CSAT lacked organizational standing to bring suit. (CR 228-467.)

Trial Court's Disposition: After a hearing on the City's plea to the jurisdiction, the trial court granted the City's plea in all respects and dismissed the action with prejudice. (CR 510.)

RESPONSE TO ISSUES PRESENTED

1. Appellants waived all their issues on appeal by not briefing all grounds supporting the granting of the plea to the jurisdiction.

2. The trial court correctly granted the City's plea to the jurisdiction. (Response to "Primary Issue.")

   A. The trial court correctly granted the City's plea to the jurisdiction because the court lacked subject-matter jurisdiction to address Appellants' challenge to the City's penal ordinance. (Response to "Primary Issue.") (Response to "Sub-Issue" 1.)

   B. The trial court correctly granted the City's plea to the jurisdiction because there is no waiver of the City's governmental immunity from suit for Appellants' request for declaratory relief under the Uniform Declaratory Judgments Act ("UDJA") or for Appellants' claims for attorney fees. (Response to "Sub-Issues" 1 & 2.)

   C. The trial court correctly granted the City's plea to the jurisdiction as to CSAT because CSAT lacked organizational standing to pursue this action on behalf of its members. (Response to "Sub-Issue" 3.)

ABBREVIATIONS AND RECORD REFERENCES

For the convenience of the Court, the City adopts the abbreviations and record reference designations listed on page viii of the Appellants' brief.

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CONSUMER SERVICE ALLIANCE OF TEXAS, INC.; TITLEMAX OF TEXAS, INC.; and ACE CASH EXPRESS, INC.,

Appellants,

v.

CITY OF DALLAS, TEXAS,

Appellee.

APPELLEE'S BRIEF

TO THE HONORABLE COURT OF APPEALS:

The City of Dallas files its brief to demonstrate that the trial court correctly granted its plea to the jurisdiction and dismissed the action with prejudice. Despite multiple amendments to their separate and joint petitions, Appellants did not and could not plead facts necessary to establish the trial court's exercise of equity jurisdiction over their challenge to the City's criminal ordinance. The Uniform Declaratory Judgments Act ("UDJA") does not provide subject-matter jurisdiction to determine the validity of a penal ordinance or to award attorneys' fees. Furthermore, Appellant, CSAT, does not have organizational standing to pursue

the action on behalf of its members. Accordingly, this Court should affirm the trial court's dismissal for want of jurisdiction with prejudice.

STATEMENT OF FACTS

This appeal relates to regulations of a class of credit service organizations or consumer service organization businesses ("CSOs") known as credit access businesses ("CABs"), engaged primarily in the business of arranging short-term, high-interest payday and vehicle title loans to individuals. On June 22, 2011, the Dallas City Council adopted Ordinance No. 28287 (the "Ordinance"), effective January 1, 2012, regulating CABs with physical business locations within the City. (CR 339-44.) The criminal ordinance was codified in ch. 50, art. XI of the Revised Code of Civil and Criminal Ordinances of the City of Dallas, Texas (Dallas, Tex., Code §§ 50-144-151 [CR 281-315]).

The Ordinance, intended to monitor and to protect Dallas citizens from predatory lending practices, establishes a registration program for CABs located within the City, imposes restrictions on extensions of consumer credit made by those CABs, and imposes record-keeping requirements on those CABs. (CR 281-82 [Dallas, Tex., Code § 50-144].) A violation of any provision of the Ordinance is a criminal offense punishable by fine. (CR 287-88 [Dallas, Tex., Code § 50-

146].) No portion of the Ordinance regulates the conduct of consumers or customers of a CAB. (*See* CR 339-44.)

The only provision of the Ordinance that Appellants asserted to be preempted is section 50-151.3. (CR 311-15.) That section places restrictions on the amount of credit that CABs can extend, restricts the manner of repayment, and limits the number of times the credit extension or loan may be refinanced. (CR 313-15 [Dallas, Tex., Code § 50-151.3].) For example, a CAB cannot advance cash for a motor vehicle title loan that exceeds the lesser of 3% of the consumer's gross salary or 70% of the retail value of the motor vehicle. (CR 313-15 [Dallas, Tex., Code § 50-151.3(b)].) Other limitations restrict refinancing. If the extension of credit provides for installment payments, the CAB cannot refinance or renew the loan. (CR 313-15 [Dallas, Tex., Code § 50-151.3(d)].) If the extension of credit provides for a lump-sum payment, the CAB cannot renew or refinance the loan more than three times. (CR 313-15 [Dallas, Tex., Code § 50-151.3(e)].)

The Texas Finance Code also regulates CABs. Finance Code chapter 393 provides in pertinent part:

> A credit access business may assess fees for its services as agreed between the parties. A credit access business fee may be calculated daily, biweekly, monthly, or on another periodic basis. A credit access business is

> permitted to charge amounts *allowed by other laws*, as applicable.

(CR 361-62 [Tex. Fin. Code § 393.602(b)] (emphasis added).) The provision expressly allows for "other laws" to regulate the fees charged by a credit access business. The statute speaks only to the calculation of fees for CAB services, not any other operation of the business, and does not purport to regulate the amount of credit to be extended, the manner of repayment, or the number of refinancings — the practices that the Ordinance regulates. (CR 361-62.)

On July 15, 2011, before the effective date of the Ordinance, CSAT filed its original petition seeking a declaration that the Ordinance was preempted by the Texas Finance Code, as well as injunctive relief to prevent enforcement of the Ordinance. (CR 6-14.) The City filed an original plea to the jurisdiction, special exceptions, and answer on August 8, 2011. (CR 15-77.) CSAT responded by filing its first amended petition. (CR 78-85.) Next, TitleMax and ACE jointly filed their original petition in intervention. (CR 86-95.) Subsequently, the City filed a second, consolidated plea to the jurisdiction, special exceptions, and answer. (CR 96-177.) The trial court sustained those special exceptions in part (CR 180-181) and on April 20, 2012, Appellants jointly filed a further amended petition. (CR 182-97.) On July 6, 2012, the City, again, filed special exceptions to the joint second amended petition. (CR 198-285.) On July 23, 2012, on the eve of a

scheduled hearing on the City's latest special exceptions (*see* CR 206), Appellants filed a joint third amended petition, the live petition in this action. (CR 209-27.)

Consistently throughout the multiple petitions, Appellants asserted that the trial court had jurisdiction over the matter because the Ordinance was civil in nature. (*See* CR 209-27.) Appellants disclaimed any injury to a vested property right. (CR 213 n.2.) They did not plead facts showing a conflict between any provision of the Texas Finance Code and the City's ordinance, though TitleMax, alone, did claim "preemption" through a "virtual prohibition" of its business model. (*See* CR 210.)[1] CSAT stated through its interrogatory responses that any claim of preemption based on a "virtual prohibition" of a CAB's business would have to be claimed, individually, by its members, and that it lacked information about the way its individual members conduct business to substantiate such claims. (CR 442-51 [Responses to Interrogatory Nos. 2-15].)

On December 13, 2012, the City filed its plea to the jurisdiction as to the joint third amended petition, asserting, as it had in its previous pleadings, that (1)

[1] The joint third amended petition conclusorily asserts that the Ordinance "virtually" prohibits TitleMax's "business operations" (CR 217) and its "engaging in commerce" (CR 217). However, the facts pleaded by TitleMax make it clear that TitleMax is *not* alleging that the Ordinance completely prevents it from engaging in title lending in the City, but instead is only alleging the that Ordinance would make TitleMax alter its current business model because "[t]he provisions of the Ordinance that limit loan amounts, restrict loan duration and renewals, and mandate minimum repayment terms, combined to prevent TitleMax from continuing to operate its business as currently authorized by state law." (CR 217.) In other words, TitleMax complains that it must alter its business model to conform to the Ordinance.

the Court lacked subject-matter jurisdiction to construe, declare invalid, or enjoin enforcement of the City's penal ordinance, and (2) CSAT lacked organizational standing to bring suit. (CR 228-467.)

Three days before the scheduled hearing on the City's plea to the jurisdiction, through their response to the City's plea, Appellants acknowledged that the Ordinance was penal and claimed for the first time that they were invoking the court's equity jurisdiction because they lacked an adequate remedy at law. (CR 473-89; RR 5.) Appellants claimed that between June 17, 2012, the date the City notified them that it would begin enforcement of the Ordinance, and February 5, 2013, the date of the plea hearing, the absence of any enforcement action by the City left them with "no ability to challenge the Ordinance through the criminal courts." (CR 475.) Yet, Appellants could cite to no known violations of the Ordinance that would warrant prosecution. (RR 14.) TitleMax specifically stated that it had not violated the Ordinance in a manner to warrant prosecution. (RR 12, 13, 20.) Additionally, the Texas Office of Consumer Credit Commissioner ("OCCC"), the state agency responsible for implementing the Texas Finance Code, issued a bulletin on December 11, 2012, critical of CABs that appeared to be evading the restrictions of municipal ordinances like the one at issue in Dallas by

directing consumers who obtain loans within a regulated city to renew or refinance their loans at locations outside those regulated cities. (CR 472.)

During the hearing on the City's plea to the jurisdiction, Appellants made no effort to rebut or address the City's arguments that no subject-matter jurisdiction had been established because Appellants had no valid claim for field or conflict preemption. (*See, e.g.*, RR 6-9.) TitleMax, alone, claimed that the prospect of Ordinance enforcement inhibited its Dallas operations—but denied violating the Ordinance while continuing operations within the City. (*See, e.g.*, RR 11-13.) The only "virtual prohibition" claimed by TitleMax during the argument on the plea to jurisdiction was that it hesitated to do business in Dallas for fear of enforcement but admitted that it was not aware of any instance in which it was violating the ordinance. (RR 11-13.) Following the hearing, the trial court granted the City's plea in all respects and dismissed the action with prejudice by its order dated February 5, 2013. (CR 510.)

SUMMARY OF ARGUMENT

A civil court of equity lacks jurisdiction to enjoin the enforcement of a criminal statute unless the statute is unconstitutional and its enforcement will result in irreparable harm to a vested property right. *State v. Morales*, 869 S.W.2d 941 (Tex. 1994). Appellants do not address in their brief all the grounds for the

granting of the plea to the jurisdiction, including the City's argument that equity jurisdiction does not authorize an injunction against the enforcement of a penal ordinance in the absence of a valid claim that the enforcement would violate a constitutional right. Appellants do not argue they have a valid constitutional claim. Their failure to take advantage of the opportunity to present argument on a valid constitutional claim results in waiver of all their issues on appeal. Therefore, this Court should affirm the trial court's final order of dismissal.

Moreover, Appellants did not and cannot make a valid claim that the City's ordinance is unconstitutional or preempted. They have no recognized vested property right at stake. The UDJA does not provide subject-matter jurisdiction to determine the validity of a penal ordinance or to award attorney fees based on such a declaration. CSAT lacks standing to bring this action on behalf of its members. Accordingly, the trial court correctly dismissed the lawsuit for lack of subject-matter jurisdiction.

ARGUMENT

I. Standard of review and applicable law.

A. The Court reviews the plea to the jurisdiction de novo.

A plea to the jurisdiction contests a trial court's subject-matter jurisdiction. *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999). The purpose of the

plea "is not to force the plaintiffs to preview their case on the merits, but to establish a reason why the merits of the plaintiffs' claims should never be reached." *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). In *Miranda,* the supreme court identified the proper analysis for deciding whether a plea to the jurisdiction should be granted. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226-27 (Tex. 2004). When a plea to the jurisdiction challenges the pleadings, the court determines if the pleader has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause. *Id*. (citing *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993)). Courts construe the pleadings liberally in favor of the plaintiff and look to the pleader's intent. *Miranda*, 133 S.W.3d at 226. If the pleadings do not contain sufficient facts to affirmatively demonstrate the trial court's jurisdiction but do not affirmatively demonstrate incurable defects in jurisdiction, the issue is one of pleading sufficiency and the plaintiff should be afforded the opportunity to amend. *Miranda*, 133 S.W.3d at 226-227 (citing *Cnty. of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002)). However, if the plaintiff has had the opportunity to amend and the plaintiff's amended pleading still does not allege facts that would constitute a waiver of immunity, then the trial court should dismiss the plaintiff's action with prejudice. *See Harris Cnty. v. Sykes*, 136 S.W.3d 635, 639 (Tex.

2004). Additionally, if the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiff an opportunity to amend. *Miranda*, 133 S.W.3d at 227.

This Court reviews a plea to the jurisdiction de novo. *Id.*

B. There is no subject-matter jurisdiction for a civil court to enjoin or determine the constitutionality of a criminal ordinance.

Morales articulates the "legion" of precedents in Texas law holding that intervention by a civil court in the enforcement of a criminal statute is inappropriate unless the statute is (1) unconstitutional and (2) there is the threat of irreparable injury to vested property rights. *See Morales*, 869 S.W.2d at 945. The fact that a plaintiff characterizes an ordinance in its pleadings as unconstitutional does not control the jurisdictional determination. *See Creedmoor-Maha Water Supply Corp. v. Tex. Comm'n on Envtl. Quality*, 307 S.W.3d 505, 516 (Tex. App.—Austin 2010, no pet.). Instead, the court determines its jurisdiction by construing statutory, constitutional, and ordinance provisions that are implicated, applying them, and determining whether an alleged act is a constitutional violation. *See id.*

II. Appellants' brief does not address all grounds for the granting of the plea to the jurisdiction.

The City brought its plea to the jurisdiction on several grounds, including that Appellants did not plead a valid constitutional violation. (CR 249-57.) To bring a civil suit to enjoin a criminal ordinance, the ordinance must be unconstitutional. *Morales*, 869 S.W.2d at 945. Appellants have not cited a single authority or made any argument that the Ordinance is actually unconstitutional or preempted. (App. Br. 1-18.) Courts of equity will not restrain the enforcement of a penal ordinance unless it is first shown to be absolutely void. *Liegl v. City of San Antonio*, 207 S.W.2d 441, 443 (Tex. Civ. App.—San Antonio 1947, writ ref'd n.r.e.).

The City demonstrated that the Ordinance was not unconstitutional or preempted. (CR 248-57.) A determination that the Ordinance was not preempted or unconstitutional would be sufficient to support the trial court's grant of the City's plea to the jurisdiction. Appellants were entitled to present argument on all grounds upon which they contend the trial court's judgment was improper. *See Malooly Bros., Inc. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970). However, they have not made an argument or presented authority as to the validity of their constitutional claims. *See* Tex. R. App. P. 38.1. Their failure to take advantage of the opportunity to present argument on a valid constitutional claim results in

waiver. *See Juarez v. Miller*, 05-04-01305-CV, 2005 WL 1331650 (Tex. App.—Dallas June 7, 2005, pet. denied) (holding that the failure to argue all grounds in support of a plea to the jurisdiction results in waiver). Accordingly, all of Appellants' issues should be overruled and the trial court's dismissal for want of jurisdiction should be affirmed. *See id.*

III. The trial court correctly granted the City's plea to the jurisdiction under the *Morales* legal standard.

Appellants requested a declaration that the City's ordinance was preempted and an injunction to prevent its enforcement. Because Appellants agree that the City's ordinance is penal, the trial court's equity jurisdiction to determine the validity of a penal ordinance is governed by the standard set by *Morales*, 869 S.W.2d at 945. In fact, Appellants have pleaded facts that place this case squarely within the parameters of the types of cases that *Morales* governs. Under *Morales*, there are four types of cases in which a party might seek relief from an equity court based on the alleged unconstitutionality of a criminal statute:

> (1) the statute is enforced and the party is being prosecuted,
>
> (2) the statute is enforced and the threat of prosecution is imminent, although the party has yet to be prosecuted,
>
> (3) There is no actual or threatened enforcement of the statute and the party does not seek injunction against

> its enforcement, but the statute is nonetheless integrally related to conduct subject to the court's equity jurisdiction, or
>
> (4) There is no actual or threatened enforcement of the statute and no complaint of specific conduct remedial by injunction.

Morales, 869 S.W.2d at 944-45. In this case, Appellants acknowledge that the City has made clear it will enforce the Ordinance. (CR 485-87.) Appellants also state that they have yet to be prosecuted, though they complain about the City's "threat of potential enforcement" of the Ordinance. (CR 477, 488-89.) These facts place this case within the second scenario described in *Morales*, where the threat of prosecution under the City's ordinance is imminent, but the parties challenging the Ordinance have yet to be prosecuted.[2] Under this scenario, *Morales* states unambiguously that "intervention by an equity court is inappropriate . . . unless the statute is unconstitutional and there is the threat of irreparable injury to vested property rights." *Morales*, 869 S.W.2d at 945. Appellants cannot meet either of these requirements.

[2] Although Appellants claim that there is no enforcement of the Ordinance in their brief (App. Br. 9-10), they pleaded that enforcement was imminent when requesting injunctive relief (CR 218). The City sent notice that the Ordinance would be enforced. (CR 487.) Any assertion that the Ordinance would not be enforced is not supported in the record. Appellants' choosing to follow or to avoid the effects of the Ordinance (RR 12, 13, 20) does not eliminate the threat of enforcement.

A. Appellants have made no valid constitutional challenge and no valid claim that the Ordinance is preempted.

Appellants have not challenged the Ordinance for violating any personal right guaranteed by the Constitution. (S*ee* CR 209-27; RR 24-25.) Instead, Appellants assert that the Ordinance is invalid because it is preempted by chapter 393 of the Texas Finance Code, as it "regulates the field of business in which CABs operate." (CR 211.) However, the Texas Constitution empowers home-rule municipalities like the City to adopt ordinances so long as they do not conflict with the constitution or state law. Tex. Const. art XI, § 5 ("no . . . ordinance passed . . . shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State"). Accordingly, the entry of the state into a field of legislation does not automatically preempt city regulation. *Barnett v. City of Plainview*, 848 S.W.2d 334, 338-39 (Tex. App.—Amarillo 1993, no writ). The Texas Supreme Court has consistently rejected claims that state regulations so occupy a field that the state law preempts home-rule city ordinances in the same field. *See, e.g.*, *City of Brookside Village v. Comeau,* 633 S.W.2d 790, 796 (Tex. 1982) ("The 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."); *accord City of Richardson v. Responsible Dog Owners*, 794 S.W.2d 17, 19 (Tex. 1990).

1. The Texas Finance Code does not explicitly prohibit the Ordinance.

Under Texas law, "[i]f the Legislature decides to preempt a subject matter normally within a home-rule city's broad powers, it must do so with *unmistakable clarity*." *In re Sanchez*, 81 S.W.3d 794, 796 (Tex. 2002) (emphasis added). Consequently, "the mere fact that the legislature has enacted a law addressing a subject does not mean that the subject matter is completely preempted." *Responsible Dog Owners*, 794 S.W.2d at 19. There is no implied preemption of a city ordinance by state law. *See Dallas Merch.'s & Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 491-92 (Tex. 1993). An example of preemptive language can be found in the Texas Alcoholic Beverage Code. It states with unmistakable clarity that it was "the intent of the legislature that this code shall *exclusively* govern the regulation of alcoholic beverages in this state . . . ." *Id.* at 491-92 (emphasis added).

The Texas Finance Code does not state with "unmistakable clarity" or otherwise that cities are preempted from exercising their home-rule powers in the area of CAB regulation. Rather, the Finance Code provisions relating to CABs expressly leave room for municipal enactments. For example, section 393.602(b)

provides that "[a] credit access business is permitted to charge amounts *allowed by other laws*, as applicable." Tex. Fin. Code § 393.602(b) (emphasis added). This sentence indicates that other laws regulating credit charges by CABs are not only permitted but anticipated and precludes any "unmistakable clarity" to preempt related regulations by home-rule municipalities. Additionally, the OCCC's bulletin of December 11, 2013, admonishing CABs that circumvent municipal ordinances like the one in Dallas by directing customers to renew their loans elsewhere, stated that those CABs are running afoul of "the legislative intent of house bills 2592 and 2594." (CR 472.) That bulletin is further evidence that the state believes ordinances like the City's are ancillary to and in harmony with the general scope and purpose of the state enactment, rather than preempted by the state. Thus, the Texas Finance Code does not prohibit the City's Ordinance.

2. The Ordinance does not conflict with state law.

Not only are Appellants incorrect about field preemption, but there is also no conflict preemption of the City's ordinance by the Texas Finance Code. Appellants asserted that because the Ordinance "limits the number of installments and renewals," it "thereby infring[es] on the parties' right to agree to the amount and calculation of the CAB fees," which Appellants argue is inconsistent with

section 393.602(b) of the Texas Finance Code. (CR 216.) Section 393.602(b) states in its entirety:

> A credit access business may assess fees for its services as agreed between the parties. A credit access business fee may be calculated daily, biweekly, monthly, or on another periodic basis. A credit access business is permitted to charge amounts allowed by other laws, as applicable.

(CR 361-62 [§ 393,602(b)].) Nothing in the Ordinance regulates the fees that a CAB may assess for its services or the periodic calculation of those fees in any manner that conflicts with the Texas Finance Code. (*See* CR 339-44.) A "state law preempts a home rule city ordinance only to the extent the state law is irreconcilably inconsistent." *State v. Chacon*, 273 S.W.3d 375, 378 (Tex. App.—San Antonio 2008, no pet.). Because the Ordinance is not inconsistent with the Texas Finance Code and does not make it impossible for any party to comply with both, Appellants' preemption argument on this ground was properly rejected by the trial court.

The Ordinance restricts *credit*: the terms under which credit may be extended, refinanced, or renewed. For example, the Ordinance limits cash advances to the lesser of 3% of the consumer's gross annual income or 70% of the retail value of the motor vehicle. (CR 313-15 [Dallas, Tex., Code § 50-151.3(b)].) If the extension of credit provides for a lump-sum payment, the loan cannot be

renewed or refinanced more than three times. (CR 313-15 [Dallas, Tex., Code § 50-151.3(e)].) Nothing in the Texas Finance Code regulates these terms or the other terms specified in the Ordinance; therefore, there can be no inconsistency or conflict between the Finance Code's provisions authorizing the assessment of fees, limited to "amounts allowed by other laws, as applicable," and the credit restrictions of the City's ordinance. A statute and an ordinance are not held repugnant to each other if any other reasonable construction leaving both in effect can be reached. *City of Beaumont v. Fall*, 291 S.W. 202, 206 (Tex. 1927); *Barnett*, 848 S.W.2d at 338-39. Thus, the Ordinance does not conflict with the Texas Finance Code.

3. The Ordinance is not invalid for requiring TitleMax to alter its business model.

Finally, TitleMax, alone, asserted that the Ordinance is preempted because it amounted to a "virtual prohibition" of its business model.[3] (CR 217-18.) However, TitleMax pleaded no facts to support this assertion and admitted in district court that it continues to operate in Dallas while complying with the Ordinance. (RR 11-13.) All that TitleMax has pleaded in support of its "virtual

[3] CSAT has abandoned any attempt to make a "virtual prohibition" argument on behalf of its members, and acknowledged that such claims must be made by its members, individually, because it lacked information about the way its individual members conduct business to substantiate such claims. (CR 442-51 [Responses to Interrogatory Nos. 2-15].)

prohibition" argument is a prediction that its business model will become "unprofitable and unsustainable" because the Ordinance's credit restrictions "would severely limit the number of borrowers who can qualify for the size of loans typically arranged by TitleMax," which are for larger amounts and at lower rates than those offered by other CABS.[4] (CR 217-18.) As noted above, all that the Texas Finance Code authorizes is the assessment of fees, limited to amounts allowed by other laws. (CR 361-62.) Nothing in the Texas Finance Code or elsewhere in state law grants TitleMax or any other CAB a guaranteed right to sustainable profits under a particular business model or plan.

Almost any business regulation will require modification of business models and carries the potential for reducing profits, but that is not grounds for invalidating an ordinance. Texas courts have approved far more draconian business regulatory ordinances. *See, e.g., Morrow v. Truckload Fireworks, Inc.*, 230 S.W.3d 232, 239 (Tex. App.—Eastland 2007, pet. dism'd as moot) (concluding that an ordinance virtually prohibiting fireworks business within a city was a valid regulation).

[4] Implicitly, TitleMax's argument admits that other CABs, loaning lesser amounts or following a different business model, *could* comply with the Ordinance and remain profitable. Thus, its complaint is not an assertion that the Ordinance conflicts with a state law by prohibiting an otherwise authorized business operation, but mere dissatisfaction that it must change its loan practices in a way that would force them to compete with other CABs in order to comply with the Ordinance.

Furthermore, TitleMax has waived its argument that the Ordinance is preempted by virtually prohibiting its business, because it failed to cite any cases or other authority to support this theory of preemption. *See Washington v. Bank of New York*, 362 S.W.3d 853, 855 (Tex. App.—Dallas 2012, no pet.).[5] In the absence of any specific pleading as to which provisions of the Ordinance make it impossible for CABs to comply with any portion of the Texas Finance Code, or that deprive them of rights they are granted by the Texas Finance Code, Appellants failed to raise a case or controversy as to preemption. Therefore, the district court correctly rejected TitleMax's attempt to rely on a "virtual prohibition" theory of preemption because it is not supported by any authority or facts.

[5] There are a handful of court of appeals cases construing the since-repealed occupational tax statutes of the Texas Revised Civil and Criminal Statutes of 1925 that hold a virtual prohibition of a business authorized and taxed by state law to be in conflict with state law and void. (*See, e.g.*, *Murphy v. Wright*, 115 S.W.2d 448, 452 (Tex. Civ. App.—Fort Worth 1938, no writ) (holding that a municipal ordinance prohibiting dance halls from operating within 500 feet of any occupied building within a small city in which no such space existed was a "virtual prohibition" against such premises and void for conflicting with state laws licensing such premises)). The Texas Supreme Court has not recognized the virtual prohibition theory but has analyzed ordinances using conflict or field preemption. *See, e.g.*, *Comeau*, 633 S.W.2d at 796 ("The referenced state and federal legislation has, to an extent, preempted the field as to construction, safety, and installation of mobile homes. We find nothing in the statutes, however, that creates a conflict with the Brookside Village ordinances regulating the location of mobile homes."). In any event, "[t]he burden of showing that a city ordinance is invalid rests on the party attacking it." *Robinson v. City of Longview*, 936 S.W.2d 413, 416 (Tex. App.—Tyler 1996, no writ) (citing *Bidelspach v. State*, 840 S.W.2d 516, 517 (Tex. App.—Dallas 1992, pet. dism'd)).

B. Appellants do not have a recognized vested property right at stake.

The litany of alleged harm to the business plans, customer lists, loan portfolios, forms, websites, and business models that Appellants characterize as "vested property rights," are simply not recognized by any authority as vested property rights. (*See* App. Br. 13; CR 478-79.) Property rights are created and defined by state law. *Stratton v. Austin Indep. Sch. Dist.*, 8 S.W.3d 26, 29 (Tex. App.—Austin 1999, no pet.). Texas law narrowly limits the concept of property rights to actual ownership of real estate, chattels, and money. *Id.* (citing *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 572 (1972)). A right is "vested" when it "has some definitive rather than merely potential existence." *Tex. S. Univ. v. State St. Bank & Trust Co.*, 212 S.W.3d 893, 903 (Tex. App.—Houston [1st Dist.] 2007, pet. denied). Appellants have the burden of alleging and establishing a vested property right. *See Tex. Dep't of Transp. v. City of Sunset Valley*, 92 S.W.3d 540, 549 (Tex. App.—Austin 2002) (holding that the failure to identify authority that the right at issue was a vested property right precluded judicial review), *rev'd on other grounds*, 146 S.W.3d 637 (Tex. 2004).

Appellants claim their business model is their vested property right. (App. Br. 12.) Yet, Appellants have acknowledged that CABs do not all have the same business plan, that some CABs could comply with the City's Ordinance, and that

CSAT lacks information about the way its individual members conduct business or any harm to them. (CR 442-51.) And the authorities that Appellants cite do not support a holding that a business plan or a business model is recognized as a vested property right. (App. Br. at 12 (citing *Smith v. Decker*, 312 S.W.2d 632 (Tex. 1958); *Brazosport Sav. & Loan Ass'n v. Am. Sav. & Loan Ass'n*, 342 S.W.2d 747, 750 (Tex. 1961).)

In the case of *Smith v. Decker*, Appellants ignore the court's approval of business regulations. They correctly quoted the court when it stated that bail bondsmen challenging the constitutionality of a statute requiring their licensure had a "vested property right in making a living," but they failed to quote the words immediately thereafter: "subject only to valid and subsisting regulatory statutes." *Id.* at 634. The court recognized that a right to "make a living," subject to valid regulation, does not turn a CAB's particular business plan or model into a vested property right that cannot be regulated by a valid ordinance. Texas courts have consistently held that there is no vested property right to engage in a particular business, or to engage in business in a particular manner, without restrictions. *See, e.g.*, *Kemp Hotel Operating Co. v. City of Wichita Falls*, 170 S.W.2d 217, 219 (Tex. 1943) (holding that garbage haulers, licensed or not, had no vested property right in the business of hauling garbage); *City of Beaumont v. Starvin Marvin's Bar*

& Grill, L.L.C., No. 09-11-00229-CV, 2001 WL 6748506 (Tex. App.—Beaumont Dec. 22, 2011, pet. denied) (mem. op.) (holding that a restaurateur had no right to play music on its outdoor patio); *City of La Marque v. Braskey*, 216 S.W.3d 861, 863 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (holding that a kennel owner had no right to operate without restrictions); *Sterling v. San Antonio Police Dep't*, 94 S.W.3d 790, 793 (Tex. App.—San Antonio 2002, no pet.) (holding that the loss of unspecified "business and good will" resulting from the cessation of Sterling's gambling business was not a protected vested property right); *Liegl*, 207 S.W.2d at 443 (holding that a wrecker service had no vested property right in "ambulance chasing").

Appellants also cite to the case of *Brazosport Savings & Loan Ass'n* to support their assertion that a franchise is a recognized property right, and that their business model, websites, and forms "could be" the subject of a franchise agreement. (App. Br. at 12; CR 478-79.) In this case, Appellants have not identified the existence of any state-issued franchise or charter like the one at issue in *Brazosport Saving & Loan Ass'n*,[6] and the City's ordinance does not infringe upon any such franchises or charters. Thus, *Brazosport* is simply inapplicable.

[6] In recognizing state-issued franchises or charters to operate banking institutions as property rights, the court in *Brazosport Saving & Loan Ass'n*, specifically pointed out that savings and loans are "quasi-public" institutions whose charters required a showing of public necessity. 342 S.W.2d at 750.

Appellants' position is much more similar to the position of the fireworks business in *Morrow*, 230 S.W.3d at 239. In *Morrow*, the court recognized that Midland County's total ban on the use of fireworks would "destroy Truckload's business and cause an unrecoverable loss of income," taking into account Truckload's contractual obligations on numerous leased properties within the county and investment in inventory. *Id.* at 239. Nonetheless, the court specifically held that Truckload's "tremendous financial loss . . . , even though *tangible and significant*, is insufficient to constitute a vested property right," because the loss was related to restrictions on personal rights, not a vested property right to engage in a particular business. *Id.* (emphasis added). In this case, Appellants' claim to lost business does not implicate a vested property right any more than did the claim of the fireworks seller in *Morrow*.

Because Appellants failed to show that a recognizable property right is at stake or would be irreparably harmed, the trial court correctly determined that it lacked subject-matter jurisdiction under the standard set by *Morales*.

C. The *Austin City Cemetery* case is not an exception to *Morales* and does not set a different standard for a court's exercise of equity jurisdiction.

Unable to show a valid constitutional claim or vested property right is at stake, Appellants contend that these requirements under *Morales* do not apply if

they can merely show that they lack an adequate remedy at law, citing as their authority the 1894 case of *City of Austin v. Austin City Cemetery Ass'n*, 28 S.W. 528 (Tex. 1894). Appellants' efforts to relieve themselves of the standard set by *Morales* arise from their misconstruction and misapplication of the *Austin City Cemetery* case.

In *Austin City Cemetery*, the Texas Supreme Court was answering certified questions relating to the cemetery association's challenge against an Austin ordinance that made it a crime for anyone to bury or cause a body to be buried outside the locations prescribed by the city. 28 S.W. at 528-29. One of the questions certified asked if the cemetery association could seek declaratory and injunctive relief if the facts showed it would suffer irreparable harm to real property it had purchased for a cemetery because no one would come to its property with a body for burial for fear of violating the ordinance. *Id*. at 529. In answering that question, the Supreme Court stated that "if the ordinance . . . be void, ... equity will grant relief when there is not a plain, adequate and complete remedy at law." *Id*. The court indicated that an adequate remedy at law may be lacking if the association would suffer a total destruction of the value of its property for the purpose for which it was acquired and the criminal ordinance could not be challenged through the criminal courts because no one, for fear of

prosecution, would ask a cemetery owner to bury a body in a proscribed location. *Id*. at 529-30.

There is nothing in the supreme court's decision in *Austin City Cemetery* that is inconsistent with the standard articulated in *Morales* for a civil court's exercise of equity jurisdiction to review a criminal statute. Both cases require a petitioner to show that the criminal statute is unconstitutional *and* that enforcement would cause irreparable harm to a vested property right to establish equity jurisdiction. The *Morales* court, in fact, cited to the *Austin City Cemetery* case and distinguished its holding by noting that what was lacking in *Morales* was not an adequate remedy at law, but any risk of irreparable harm from a criminal statute that all parties acknowledged was never enforced. *Morales*, 869 S.W.2d at 944, n.7.

In this case, there is no allegation or evidence that the Ordinance would not or could not be enforced. Instead, Appellants acknowledge that the Ordinance is not being violated. Appellants contend they have no adequate remedy at law to challenge the Ordinance through the normal course of a criminal prosecution, not because the Ordinance has driven away *their customers*, as in the *Austin City Cemetery* case, depriving them of any opportunity to violate the Ordinance, but because their fear of the potential financial consequences has prevented *them* from

violating the Ordinance. (CR 475-77; App. Br. at 9-10.) Simultaneously, they attempt to argue that, even though they have no evidence of violations by a CAB, and even though only eight months had passed from the time the City warned it would enforce the ordinance to the time their suit was dismissed, the City has "opted not to enforce the Ordinance," rendering a challenge through the criminal courts impossible. (App. Br. at 5; CR 475-77, RR 11-13.) Appellants obey the ordinance and claim that it is not enforced.

This Court has reviewed a similar assertion that a business had no adequate remedy at law to challenge a city ordinance. *See City of Dallas v. Dallas Cnty. Housemovers Ass'n*, 555 S.W.2d 212, 213 (Tex. Civ. App.—Dallas 1977, no writ). In that case the Housemovers Association sued the City, and various city officials, seeking to enjoin the enforcement of certain sections the Dallas City Code that regulate the moving of buildings within the city. *Id.* at 213. The housemovers claimed that certain sections of the ordinance were unconstitutional restrictions upon their alleged right to conduct an otherwise lawful business. *Id.* The ordinance restricted various facets of the housemoving business including inspection of vehicles and equipment used in transporting buildings on city streets, prohibiting the importation of buildings and structures from outside the city limits except under certain specified circumstances, restricting the total width of

transported buildings, and regulating the maximum height of buildings and structures that may be transported without giving written notice to utility companies before the move. *Id.*

The Court, in addressing its jurisdiction, considered the *Austin City Cemetery* case. The Court recognized that in the *Austin City Cemetery* case,

> the court reasoned that the operator would be effectively prevented from ever challenging the validity of the provision because his customers would be reluctant to expose themselves to criminal liability in order to test the law. Thus, without a customer willing to accept that risk, the businessman could not violate the provision and test its validity in a criminal prosecution.

Id. at 214. In examining the housemovers' situation, the Court found a distinction. The housemovers were free to disregard the ordinances and test their validity as a defense to prosecution. *Id.* No penalty is prescribed for those employing housemovers in violation of the ordinances, and, with respect to the storage regulation, no customer is even remotely involved in the acts that constitute the violation. *Id.* The housemovers had not shown that the enforcement of the ordinance would cause them any harm other than that inherent in prosecution for an offense. *Id.* The Court then dismissed the complaint. *Id.* at 215.

Like the housemovers in *Dallas County Housemovers Association*, Appellants are, in fact, free to violate the Ordinance in order to challenge its

prosecution, with no risk of criminal prosecution of any customer. Appellants' argument that a challenge through the criminal courts is impossible because the City has yet to issue a citation falls flat when Appellants deny violating the Ordinance and can cite to no violations occurring within the City. They have placed the City in the position of having no violations to enforce.

Appellants' refusal to incur an up-to-$500-per-day fine does not warrant a civil court's exercise of equity jurisdiction to issue injunctive relief. Texas courts have long held that the fear or apprehension of the possibility of injury is not a basis for injunctive relief. *See, e.g.*, *Morales*, 869 S.W.2d at 946-47 (citing *Frey v. DeCordova Bend Estates Owners Ass'n*, 647 S.W.2d 246, 248 (Tex. 1983) (holding that without proof of a violation of the challenged provision, there was no actual irreparable injury to support injunctive relief); *Camp v. Shannon*, 348 S.W.2d 517, 519 (Tex. 1961) (explaining that an injunction should not issue on the mere surmise of injury)). In short, Appellants' acknowledgement that they have refused to violate the Ordinance for fear of incurring a fine establishes facts affirmatively negating the court's subject-matter jurisdiction. As in *Dallas County Housemovers Association*, Appellants have not shown that the enforcement of the ordinance will cause them any harm other than that inherent in prosecution for an offense.

Therefore, because the *Austin City Cemetery* case does not apply to the Appellants' challenge and Appellants cannot show a valid constitutional violation or irreparable injury to a vested property right, the trial court properly dismissed the action for lack of subject-matter jurisdiction.

IV. The trial court correctly determined there is no subject-matter jurisdiction to declare a penal ordinance invalid and to award attorney fees under the Uniform Declaratory Judgment Act.

Appellants have requested a declaration that the City's Ordinance is invalid and requested attorney fees under the UDJA. (CR 214-15, 219.) Appellants assert that the UDJA provides a waiver of immunity from suit to determine the validity of the Ordinance. (Appellants' Brief 14-16; CR 214- 15.) Appellants agree that the Ordinance is penal. (RR 5; App. Br. vii, 4.) Because the Ordinance is penal, the analysis of the request is similar to that for the injunctive relief already discussed in the preceding section.

In particular, the UDJA is a procedural device for deciding cases already within a court's subject-matter jurisdiction. *Morales*, 869 S.W.2d at 947; T*ex. Ass'n of Bus.*, 852 S.W.2d at 444. A request for declaratory relief cannot confer subject-matter jurisdiction on the court, nor can it change the basic character of a suit. *Morales*, 869 S.W.2d at 947. When the validity of a criminal statute can be determined in any criminal proceeding that may arise from the statute's

enforcement and no vested property rights are threatened, there is no occasion for the intervention of equity. *Morales*, 869 S.W.2d at 945; *Passel v. Fort Worth Indep. Sch. Dist.*, 440 S.W.2d 61, 63 (Tex. 1969). The legislature did not intend the UDJA to enlarge the jurisdiction of the civil courts to rule on the constitutionality of criminal statutes. *Dallas Cnty. Dist. Attorney v. Doe*, 969 S.W.2d 537, 542 (Tex. App.—Dallas 1998, no pet.). "A civil court simply has no jurisdiction to render naked declarations of 'rights, status or other legal relationships arising under a penal statute.'" *Morales*, 869 S.W.2d at 947 (quoting *Malone v. City of Houston*, 278 S.W.2d 204, 206 (Tex. Civ. App.—Galveston 1955, writ ref'd n.r.e.)).

In this case, the City demonstrated that Appellants failed to make a valid constitutional claim and failed to show that any vested property right is at stake. (*See* discussion section I, above.) Absent such showings to warrant the civil court's exercise of equity jurisdiction over a penal ordinance, no subject-matter jurisdiction exists, and Appellants' reference to the UDJA does not alter the trial court's jurisdiction. Accordingly, the trial court correctly determined that the City had not waived its governmental immunity from suit under the UDJA.

Additionally, Appellants have requested attorney fees based on the UDJA. (CR 219.) Because Appellants have no proper claim for declaratory relief, they do

not have a claim for attorney fees under chapter 37 of the Texas Civil Practices and Remedies Code. *See City of Dallas v. Turley*, 316 S.W.3d 762, 772 (Tex. App.—Dallas 2010, pet. denied). Furthermore, Appellants have not pleaded a waiver of immunity for attorney fees based upon any other statute, nor can they plead such a waiver. Accordingly, the trial court correctly dismissed Appellants' claims for attorney fees.

V. The trial court correctly determined that Appellant CSAT lacked organizational standing to challenge the ordinance on behalf of its members.

CSAT has no organizational standing to challenge the Ordinance on behalf of its members when it cannot establish subject-matter jurisdiction without the participation of individual members in the lawsuit. *See Tex. Ass'n of Bus*., 852 S.W.2d at 447 (holding that if the claim asserted or relief requested requires the participation of individual members in the action, a representative organization lacks standing to represent its members). Appellants have not shown that the Ordinance is preempted based on field preemption or any actual conflict between the Ordinance and the Texas Finance Code, making it impossible for any CAB to comply with both the Texas Finance Code and the Ordinance. TitleMax, as an individual member of CSAT, attempted to assert preemption based on a "virtual prohibition" of its business model, but, as CSAT has acknowledged, any other

claims of preemption based on a "virtual prohibition" of a CAB's business would have to be made, individually, by its members because it lacks information about the way its individual members conduct business to substantiate such claims. (CR 442-51 [Responses to Interrogatory Nos. 2-15].)

Similarly, CSAT must have its individual members' participation to claim that each has a vested property right that is definitive, not merely potential, and that such right would be irreparably harmed by the City's Ordinance. Since CSAT lacks information about the way its individual members conduct business, it cannot appropriately claim on their behalf what harm, if any, they would suffer by complying with the City's Ordinance.

CSAT also lacks organizational standing to challenge the Ordinance in the absence of any allegation demonstrating that each member desires to extend credit or act in other manners in violation of the Ordinance, or that any of them have actually violated the Ordinance to seek injunctive relief. *See Tex. Ass'n of Bus*., 852 S.W.2d at 447; *Miranda*, 133 S.W.3d at 226; *Frey*, 647 S.W.2d at 248. Because the participation of each member of CSAT would be required for it to even establish the trial court's subject-matter jurisdiction in this case, the trial court correctly ruled that CSAT lacks organizational standing to bring suit on behalf of its individual members.

PRAYER

Because Appellants have failed to state a valid constitutional or preemption claim and failed to show that the Ordinance would cause irreparable harm to any recognized vested property interests, they failed to demonstrate that the Court has subject-matter jurisdiction, or that the City has waived its immunity from suit or claims for attorney fees based on the Declaratory Judgments Act. Furthermore, CSAT has failed to establish its organizational standing to bring suit on behalf of its members in this action. Accordingly, the Court should affirm the trial court's grant of the City's plea to the jurisdiction in all respects, and affirm the dismissal of all claims with prejudice.

Respectfully submitted,

THOMAS P. PERKINS, JR.
Dallas City Attorney

/s/ Jennifer C. Wang
Barbara Rosenberg (Texas Bar No. 17267700)
barbara.rosenberg@dallascityhall.com
James Pinson (Texas Bar No. 16017700)
james.pinson@dallascityhall.com
Jennifer C. Wang (Texas Bar No. 24049537)
jennifer.wang@dallascityhall.com
Assistant City Attorneys

City Attorney's Office
1500 Marilla Street, Room 7D North
Dallas, Texas 75201
Telephone: 214-670-3519
Telecopier: 214-670-0622
Barbara.Rosenberg@dallascityhall.com
Jennifer.Wang@dallascityhall.com
James.Pinson@dallascityhall.com

ATTORNEYS FOR APPELLEES

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Michael P. Lynn
Richard A. Smith
Kent D. Krabill
Lynn Tillotson Pinker & Cox, LLP
2100 Ross Avenue, Suite 2700
Dallas, Texas 75201

COUNSEL FOR APPELLANTS
CONSUMER SERVICE ALLIANCE OF TEXAS, INC., and
ACE CASH EXPRESS, INC.

Carol C. Payne
Dawn Estes
Anthony P. Miller
Estes Okon Thorne & Carr, PLLC
3500 Maple Avenue, Suite 1100
Dallas, Texas 75219

COUNSEL FOR APPELLANT
TITLE MAX OF TEXAS, INC.

/s/ Jennifer C. Wang
Attorney for the City of Dallas

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/s/ Jennifer C. Wang
Attorney for the City of Dallas

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